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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS, ETC., PETITIONERS,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 21, 1931

CERTIORARI GRANTED JANUARY 25, 1932

(36,395)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No.

GEORGE J. ADAMS AND A. W. KITCHEN, CO-PARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,

Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RECORD

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INDEX.

Index to record in United States District Court i
Clerk's certificate 279
Record in United States Circuit Court of Appeals:
Placita 381
Certificate of Clerk of District Court to certain original defendant's exhibits, filed October 31, 1930.. 381
Appearance of counsel for appellants, filed October 31, 1930 382
Appearance of counsel for appellee, Andrew W. Mellon, Director General, filed November 4, 1930.. 383
Appearance of counsel for appellee, Union Stock Yards & Transit Company, filed November 4, 1930 384
Appearance of counsel for appellee, Andrew W. Mellon, Director General of Railroads, as Agent, filed January 24, 1931 385
Stipulation that Court may set cause for argument, filed March 23, 1931 386
Order of March 23, 1931, setting cause for hearing.. 387
Hearing, May 14, 1931 388
Opinion, filed July 27, 1931 389
Judgment, entered July 27, 1931 400
Memo in re filing petition for rehearing, August 15, 1931 405
Proof of service of petition for rehearing, filed August 15, 1931:
Receipt 406
Affidavit of mailing copies 407

Memo in re filing answer to petition for rehearing, August 24, 1931 408
Memo in re filing reply to answer to petition for rehearing, August 27, 1931 408
Order of September 22, 1931, denying petition for rehearing, staying mandate, and that proof of filing of the petition for writ of certiorari in the Supreme Court of the United States be filed 409
Order of November 4, 1931 that original exhibits may be withdrawn and transmitted to the Clerk of the United States Supreme Court 410
Clerk's certificate 411

Order allowing certiorari 413

IN THE

United States Circuit Court of Appeals

For the Seventh Circuit

OCTOBER TERM, A. D. 1930.

No. 4462

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,

Appellants,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC., ET AL.,

Appellees.

Counsel for Appellants:

MR. FRANKLIN J. STRANSKY,
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Counsel for Appellees:

MR. A. A. McLAUGHLIN,
MR. EDGAR R. HART,
MR. SILAS H. STRAWN,
MR. RALPH M. SHAW,
MR. FRANK M. TOWNER,

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

INDEX.

Placita 1
Praecipe for summons 2
Security for costs 3
Petition, filed Dec. 10, 1928 4
Appearance of counsel for defendant, A. W. Mellon, Director General of Railroads, as Agent, etc. 19
Appearance of counsel for defendant, The Union Stock Yard & Transit Company 20
Stipulation and order extending time for defendant to answer or demur to declaration to Apr. 15, 1929 20-21
Answer of defendant, The Union Stock Yard & Transit Company of Chicago, filed Apr. 5, 1929 21
Answer of A. W. Mellon, Director General of Railroads, as Agent, filed Apr. 8, 1929 30
Order of Oct. 26, 1929, setting cause for trial 45
Order of Jan. 6, 1930 continuing trial 46
Trial . . . . . 46, 56 to 59
Motion of defendant, A. W. Mellon, Director General of Railroads, as Agent, for a directed verdict, filed Jan. 9, 1930 47
Motion of defendant, Union Stock Yard & Transit Co. for a directed verdict, filed Jan. 9, 1930 52
Order of Jan. 17, 1930 taking motions for directed verdict under advisement 58
Opinion by Woodward, J., on motion for directed verdict, filed Jan. 28, 1930 60
Verdict, filed Jan. 28, 1930 77
Judgment, entered Jan. 28, 1930 78
Plaintiffs' motion to vacate certain orders 79
Affidavit of Elwood G. Godman 79
Order of Jan. 31, 1930 setting date for hearing on motion to vacate certain orders 82

Orders continuing hearing on motion to vacate certain orders 82-83
Reasons assigned in support of motion to vacate and set aside certain orders, filed Apr. 11, 1930. 84
Motion to amend petition 86
Exhibit A—Amendment to petition. 102
Order of Apr. 18, 1930, taking motion to vacate certain orders, under advisement 111
Memorandum by Woodward, J., filed July 31, 1930. 112
Order of July 31, 1930 overruling motion to vacate certain orders and overruling motion to amend petition. . 118
Order of Aug. 28, 1930, amending order of July 31, 1930. 119
Order of Sept. 29, 1930, extending time for filing bill of exceptions 120

BILL OF EXCEPTIONS.

Plaintiff's Witness:
Park, Henry R. 216
Defendant's Witness:
Gillis, Thomas H. 294

	Received in evidence at page	Reproduced at page
Plaintiff's Exhibits:		
No. 1—Opinion and decision of the Interstate Commerce Commission, Chicago Live Stock Exchange vs. A. T. & S. F. Ry. Co., et al., decided Feb. 11, 1919	121	121
No. 2—Report and decision of the Interstate Commerce Commission, Chicago Live Stock Exchange vs. A. T. & S. Fe. Ry. Co., et al., decided July 15, 1920	141	141
No. 3—Opinion and decision of the Interstate Commerce Commission, Chicago Live Stock Exchange vs. A. T. & S. F. Ry. Co., et al., decided June 2, 1925	146	147

	Received in evidence at page	Reproduced at page
No. 4—Order of the Interstate Commerce Commission, Chicago Live Stock Exchange vs. A. T. & S. F. Ry. Co. entered Dec. 12, 1927	157	157
No. 5—Order of Interstate Commerce Commission, Chicago Live Stock Exchange vs. A. T. & S. F. Ry. Co. entered May 14, 1928	210	210
No. 6—Order of Interstate Commerce Commission, Chicago Live Stock Exchange vs. A. T. & S. F. Ry. Co. entered Nov. 27, 1928	214	214
Defendant's Exhibits:		
No. 1—Stipulation re: certain facts	243	232-296
No. 2—Complaint filed by Chicago Live Stock Exchange before the Interstate Commerce Commission, Docket No. 9977	243	243
No. 3—Complaint filed by Chicago Live Stock Exchange before Interstate Commerce Commission, Docket No. 12614	257	257
No. 4—Order of Interstate Commerce Commission entered Apr. 8, 1922, re-opening cases for further hearing	267	267
No. 5—Transcript of testimony before Interstate Commerce Commission on Nov. 8, 1917, Docket No. 1118	268	
No. 6—Transcript of testimony before Interstate Commerce Commission, March 13 to 16, 1918, Docket Nos. 9977 and 1118	268	
No. 7—Transcript of testimony before Interstate Commerce Commission, May 20 to 22, 1919, Docket No. 9977	269	
No. 8—Transcript of testimony before Interstate Commerce Commission on July 14, 1921, Docket No. 12614	269	

	Received in evidence at page	Reproduced at page
No. 9—Transcript of testimony before Interstate Commerce Commission on Oct. 3 to 6, 1922, Docket Nos. 9977 and 12614		270
No. 10—Transcript of testimony before Interstate Commerce Commission Oct. 9, 1922, Docket Nos. 9977 and 12614		270
No. 11—Transcript of testimony before Interstate Commerce Commission Nov. 6 to 9, 1922, Docket Nos. 9977 and 12614		271
No. 12—Certain documents offered before Interstate Commerce Commission at hearings March 13 to 16, 1918 (52nd Annual Report of U. S. Y. & T. Co., etc.)		271
No. 13—Act of Incorporation of U. S. Y. & T. Co.		272
No. 14—Minutes of meeting of Board of Directors of U. S. Y. & T. Co. on Mar. 2, 1865		272
No. 15—Minutes of meeting of Board of Directors of U. S. Y. & T. Co. on Mar. 4, 1865		273
No. 16—Minutes of meeting of Board of Directors of U. S. Y. & T. Co. on Jan. 17, 1866		273
No. 17—Minutes of meeting of Board of Directors of U. S. Y. & T. Co. on Oct. 18, 1867		273
No. 18—Lease dated Dec. 15, 1897 of railroad of Stock Yds. Co. to Chgo. and Indiana State Line Railroad		274
No. 19—Agreement of consolidation between Chgo. Hammond & Western R. R. Co. and Chgo. & Indiana State Line R. R. Co., dated Jan. 1, 1898		274
No. 20—Lease in perpetuity from U. S. Y. & T. Co. to Chgo. Junction Ry. Co.		275
No. 21—Copy of account sales issued by Nat. Live Stock Comm. Co. on cattle sold Dec. 17, 1917		275

	Received in evidence at page	Reproduced at page
No. 22—Santa Fe waybill		276
No. 23—Photograph of loading and unloading of stock at Union Stock Yards		276
No. 24—Photograph of unloading facilities of Stock Yards		277
No. 25—Airplane picture of premises of U. S. Y. & T. Co.		277
No. 26—Blue print showing unloading docks		278
No. 27—Print map showing Chicago Junction Ry. and connections with line-haul carriers into the Union Stock Yards		278
No. 28—Map of U. S. Y. & T. Co. property and railroads surrounding it		279
No. 29—Statement of labor cost of loading and unloading live stock at the Stock Yards in 1917, 1918 and part of 1919		279
No. 30—Letter, Apr. 25, 1919, U. S. Y. & T. Co. to Winston, Strawn & Shaw		280
No. 31—Statement of cars received at the Stock Yards April 23 to 30, 1919		280
No. 32—Statement of cost of loading and unloading live stock at Stock Yards in March, 1919		281
No. 33—Statement of cost of loading and unloading live stock at Stock Yards in April, 1919		281
No. 34—Copy of 2 bill stubs issued by I. C. R. R. showing charges on shipment		281
No. 35—Copy of rate advice 901 issued by U. S. Railroad Administration on Nov. 25, 1918		282
No. 36—Blank headed "Reparation, Chicago Live Stock Exchange Loading & Unloading Case"		282

	Received in evidence at page	Reproduced at page
No. 37—Box and contents (several thousand separate sheets showing shipments)	283	
No. 38—Assignment dated Feb. 23, 1918, Bowles to Clark	285	
No. 39—Bill of sale, dated April 7, 1919, Paris to Boothroyd	286	
No. 40—Letter, Aug. 23, 1920, Smith to "Friend Shute"	286	
No. 41—Bundle of papers containing names of shippers who made the shipments to the Stock Yards involved in this case	287	
No. 42—Copy of all contracts between Chgo. Junction Ry. Co. and line-haul carriers pertaining to demurrage charge made by Chgo. Junction Ry. Co., etc.	288	
No. 43—Statement showing receipts of cars of live stock at Stock Yards between 6 P. M. and 6 A. M. week ending Mar. 8, 1919	288	
No. 44—Copy of freight rate authority 2770 issued by Director General of Railroads, dated Nov. 16, 1918	289	289
No. 45—Rules of practice of Interstate Commerce Commission on Mar. 20, 1916	291	
General Order No. 1, dated Dec. 29, 1917	292	293
Motion of defendant, U. S. Y. & T. Co. for a directed verdict		302
Motion of defendant, A. W. Mellon, Director General, as Agent, for a directed verdict		304
Charge to the jury		310
Verdict		310
Reference to judgment, prayer for appeal, etc.		311
Motion to vacate and set aside certain orders		311
Affidavit of Elwood G. Godman		312
Reasons assigned in support of motion		315

Motion to amend petition 318
Amendment to petition 334
Reference to denial of motion to vacate orders and of motion to amend petition 343
Reference to order fixing time for filing appeal bond and bill of exceptions, etc. 343
Certificate of judge 344

Order of Oct. 24, 1930, approving bill of exceptions..... 344
Order of Oct. 24, 1930, that certain exhibits be separately certified to the U. S. Circuit Court of Appeals..... 345
Assignment of errors 346
Bond on appeal 361
Order of Sept. 22, 1930, approving bond..... 368
Order of Sept. 22, 1930, extending time for docketing cause in U. S. Circuit Court of Appeals..... 369
Notice of filing amended praecipe 369
Amended praecipe for record 370
Certificate of clerk 372
Citation 372
Stipulation re: printing record 378

Order allowing certiorari..... 413

1 Pleas in the District Court of the United States for the Placit
Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable Charles E. Woodward, District Judge of the United States for the Northern District of Illinois on Twenty-eighth day of January, in the year of our Lord one thousand nine hundred and Thirty, being one of the days of the regular December Term of said Court, begun Monday, the Sixteenth day of December, and of our Independence the 154th year.

Present:

Honorable Charles E. Woodward.
H. C. W. Laubenheimer, U. S. Marshal.
Charles M. Bates, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

George J. Adams and A. W. Kitchen, co-partners trading as Adams & Kitchen *et al.*,
Plaintiffs,
vs.
Andrew W. Mellon, Director General of Railroads, as Agent, *et al.*,
Defendants.
} No. 37517.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Praecipe in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 8th day of December, 1928.

3 And on, to wit, the 8th day of December, 1928 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court a certain Praecipe in words and figures following, to wit:

4 DISTRICT COURT OF THE UNITED STATES OF AMERICA

Northern District of Illinois

Eastern Division

November Term, A. D. 1928

George J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen, *et al.*,

Plaintiffs,

vs.

Andrew W. Mellon, Director General of Railroads, as agent of the President under Section 206 of the Transportation Act of 1920, against whom suits may be brought arising out of the operation, during the period of Federal Control, of the railroads and systems of transportation of the following carriers:

The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; The Chesapeake & Ohio Railway Company of Indiana; The Chicago and Alton Railroad Company; and William W. Wheelock and William G. Bierd, Receivers; Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway Company; Chicago, Milwaukee and St. Paul Railway Company; and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers; The Chicago, Rock Island and Pacific Railway Company; Chicago, Terre Haute & Southeastern Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Grand Trunk Western Railway Company; Illinois Central Railroad Company; Indiana Harbor Belt Railroad Company; The Michigan Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; New York Central Railroad Company; The New York Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; The Toledo, St. Louis & Western Railroad Company; and J. Frank Johnson and Harry A. Dunn, Receivers; and Wabash Railway Company; and Union Stock Yard and Transit Company of Chicago,

Defendants.

In Law.
Damages, $400,000.

The Clerk of said Court will issue a summons in said cause to said defendants, in a plea of trespass on the case to the damage of said plaintiff in the sum of Four Hundred Thou-

sand Dollars, direct the same to the United States Marshal for said District to execute, and make it returnable to the February Term of said Court, 1928.

Dated this 8th day of December, A. D. 1928.

SIMS, GODMAN & STRANSKY,
Plaintiff's Attorneys.

To Charles M. Bates, Clerk.

6 And on, to wit, the 8th day of December, 1928 came the Plaintiffs by their attorney and filed in the Clerk's office of said Court a certain Security for Costs in words and figures following, to wit: Filed De 1928.

7 * * * (Caption) * *

I enter myself as security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court; and in default of payment by the Plaintiffs of any cost ordered or adjudged to be paid by Plaintiffs hereby agree and stipulate that execution may issue against my property for all costs not exceeding two hundred dollars taxed against Plaintiffs.

Dated this 8th day of Dec., A. D. 1928.

EDWARD J. McLAUGHLIN
Residence 7841 S. Euclid Ave.
Chicago, Illinois

Acknowledged before me this 8th day of December, 1928.

CHARLES M. BATES,
Clerk.

8 And on, to wit, the 10th day of December, 1928 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit:

9 • • (Caption) • •

PETITION.

To the Honorable Judge of said Court:

1. The plaintiffs named in paragraph 2 hereof bring this action against Andrew W. Mellon, Director General of Railroads as Agent, The Union Stock Yard and Transit Company, as defendants and the parties named as defendants in paragraph 3 hereof to recover as damages certain amounts, hereinafter specifically designated, paid by the plaintiffs to the defendants named, which amounts plaintiffs allege were illegally collected by the defendants for the services of loading and unloading shipments of live stock made or received by the plaintiffs at the Union Stock Yards, Chicago, Illinois, over the lines of railroad and transportation systems of the railroad companies and corporations hereinafter named, which action is brought against said Director General of Railroads as Agent, the Union Stock Yards and Transit Company, and the other defendants named in paragraph 3 hereof pursuant to the provisions of Section 206 of the act of Congress known as the Transportation Act, 1920.

(2) The following named plaintiffs are, and each of them is, named in an order of the Interstate Commerce Commission entered the 12th day of December, 1927, as being entitled to receive from the defendants hereinafter named the amounts respectively set forth in said order of the Commission, a copy of which is hereto attached as Exhibit "A" and made a part hereof to the same extent and as fully as though the same were here set out:

The following named are the plaintiff's herein and are the parties entitled to receive the damages awarded by the Interstate Commerce Commission:

Geo. J. Adams and A. W. Kitchen, co-partners trading as Adams & Kitchen.

John G. Adler and Alfred E. Adler, co-partners trading as Adler Sons & Company.

Alexander, Conover and Martin, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

John A. Babcock, an individual trading as John A. Babcock & Company.

Fred L. Heyne and E. H. Baker, co-partners trading as Baker, Heyne & Company.

W. A. Peterson, trading as Bacon, Peterson & Company.

Bowles Live Stock Commission Company, a corporation organized and existing under the laws of the State of West Virginia with its principal place of business at Chicago in the State of Illinois.

E. C. Brown and Seth B. St. John, co-partners trading as Brown-St. John Company.

Thos. H. Brown.

George M. Brownson and J. L. Ettlinger, co-partners trading as Brownson & Ettlinger.

Byers Brothers Company, a corporation organized and existing under the laws of the State of Missouri with its principal place of business at Chicago in the State of Illinois.

Wm. B. Swiney, Chas. M. Swiney and Thos. E. Swiney, co-partners trading as Swiney Bros., successors to Bunker & Swiney.

J. B. Cahill, trading as J. B. Cahill & Company.

Central Live Stock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Ernest Clark and Louis Armbrecht, co-partners trading as Clark, Armbrecht & Company.

E. A. Clark, trading as Clark, Bowles & Company.

John Clay, John G. Forrest, C. A. Kleman, F. H. Connor and C. L. Robinson, co-partners trading as Clay, Robinson & Company.

James R. Clegg, an individual trading as James R. Clegg & Company.

A. M. Henneberry and N. W. Cochran, co-partners trading as Cochran & Henneberry.

W. P. Collings, trading as W. P. Collings & Son.

Conklin Bros. Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

H. D. Copeland & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

J. M. Corrick.

J. F. Cross and H. G. Sommers, co-partners trading as Cross, Sommers & Company.

A. B. Daniels.

P. T. Dolan and Fred Ludeman, co-partners trading as Dolan & Ludeman.

J. M. Doud & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

S. S. Driver, an individual trading as S. S. Driver & Company.

Chas. R. Beason and P. E. Moore, co-partners trading as Drovers Commission Company.

J. W. Eastland, an individual trading as J. W. Eastland & Company.

Guy Wheeler and T. K. Polley, co-partners trading as Emmett, Wheeler & Polley.

E. H. Kuenster, surviving partner of co-partnership of Erwin & Kuenster.

Evans, Snider, Buel Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Filler Wilson & McClelland, a corporation organized and existing under the laws of the State of Illinois with its
11 principal place of business at Chicago in the State of Illinois.

O. D. Freeland and C. M. Godfrey, co-partners trading as Freeland & Godfrey.

Fred Freeman an individual trading as Fred Freeman & Company.

P. J. Fitzgerald and G. S. Freeman, copartners trading as Freeman, Fitzgerald & Company.

Wm. Gentleman, A. M. Gentleman, C. F. Gentleman and G. J. Gentleman, copartners trading as Wm. Gentleman & Sons.

S. G. Gillogly, R. E. Gillogly, F. D. Gillogly and F. T. Gillogly, copartners trading as Gillogly & Company.

Chas. E. Harding, trading as Chas. E. Harding & Company.

Hefner Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Geo. F. Hogan, trading as Geo. F. Hogan & Company.

A. Warheimer, E. H. Ingwerson, J. H. Ingwerson, Dan R. Ingwerson, D. C. Mosier and A. C. Barroff, co-partners trading as Ingwerson Bros.

Iowa Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with

its principal place of business at Chicago in the State of Illinois.

I. W. Knettle and Edwin Knettle, copartners trading as Knettle Bros.

Knollin Sheep Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

E. H. Kuenster, an individual trading as Kuenster Livestock Commission Company.

A. J. Laberthe.

L. S. Larrison an individual trading as L. S. Larrison and Company.

Lee Live Stock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

F. C. Ludeman, an individual trading as F. C. Ludeman & Company.

McCausland, Hoag & Vaughn, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Wm. Mahoney.

J. P. Maley and Harry L. Carpenter, copartners trading as Maley, Carpenter & Company.

John P. Martin, James G. Martin, George E. Martin and Wm. S. Burmister, copartners trading as Martin Bros. & Company.

Miller White & Woods, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

P. T. Dolan, trading as Miller & Dolan.

Frank R. Mullen, trading as Mullen Commission Company.

Robert S. Murray, trading as Murray & McDowell.

B. F. Hubbird, trading as Minteer Hubbird & Company.

National Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Northwestern Livestock Commission, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

G. W. Nixon, C. S. Horn and W. H. Chisholm, copartners trading as Nixon, Horn & Chisholm.

North American Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Silas Palmer and W. H. Palmer, copartners trading as Silas Palmer & Son.

T. B. Vincent and C. H. Boothroyd, copartners trading as Paris Commission Company.

W. C. Patterson, trading as John Patterson & Son.

W. A. Peterson and Wm. Turnbull, copartners trading as Peterson, Turnbull & Company.

J. H. Piatt, trading as Abner Piatt & Company.

Thos. K. Polley, trading as Thos. K. Polley & Company.

R. H. Pritchard, trading as Pritchard Commission Company.

Chas. R. Rice and Oscar A. Rice, copartners trading as Rice Bros.

J. B. Roach and W. P. Roach, copartners trading as Roach Livestock Commission Company.

Rosenbaum Brothers & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

F. W. Sheldon trading as F. W. Sheldon & Company.

W. Harry Sherwood and Russell H. Sherwood, copartners trading as Sherwood & Son.

J. Paul Shinn, Chas. H. Moberly and I. O. Fry, copartners trading as Shinn, Fry & Moberly, successors to Shinn Fry & Company.

James G. Shutter.

W. R. Smith, J. C. Eastes and John Smith, copartners trading as W. R. Smith & Son.

T. B. Stafford and A. B. Stafford, copartners trading as Stafford Bros.

Standard Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

A. F. Starrett, Jr., O. A. Mathison, A. C. Granger and M. E. Peschong, copartners trading as Starrett, Mathison & Company.

Chas. H. Stephens and J. A. Goble, copartners trading as Stephens & Goble.

A. F. Stewart, trading as A. F. Stewart & Company.

J. E. Strader and J. L. Strader, copartners trading as Strader Bros.

J. J. Sullivan and J. C. Sullivan, copartners trading as Sullivan Commission Company.

A. Gilmore, C. L. Swanson and C. J. Castenholz, copartners trading as Swanson, Gilmore and Castenholz.

Harry Thompson and C. N. Ball, copartners trading as Thompson & Ball.

13 Thos. Tipton, E. M. Steck and W. P. Herrick, copartners trading as Tipton, Steck & Herrick.

D. L. Trout and F. L. Trout, copartners trading as Trout Livestock Commission Company.

G. B. Van Norman, an individual trading as G. B. Van Norman & Company.

Van Norman Lawler & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

W. H. Walter, trading as Walter Bros.

A. A. Walters, C. A. Dunbar and J. H. Dunbar, copartners trading as Walter & Dunbar.

L. B. Werden.

W. W. Wilson and Chas. A. Wilson, copartners trading as W. W. Wilson & Company.

Jet Wimp, trading as Jet Wimp & Company.

Kay Wood and Chas. A. Wood, copartners trading as Wood Bros.

Curtis A. Wood and Walter R. Wood, copartners trading as Curtis A. Wood & Company.

L. B. Yancey.

W. E. Young, trading as W. E. Young & Company.

(3) The plaintiffs and each of them allege as follows:

That the defendant The Union Stock Yard & Transit Company is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business at Chicago in said State of Illinois.

That the defendant Andrew W. Mellon, Director General of Railroads, as agent, is an officer of the United States, designated by the President, pursuant to the provisions of section 206 of the Transportation Act of 1920, as amended, as agent for the President, against whom actions at law may be brought on causes of action arising out of the possession, use or operation by the President, of the railroads and systems

of transportation of the following named railroads: The Atchison, Topeka & Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; The Chesapeake and Ohio Railway Company of Indiana; The Chicago and Alton Railroad Company; and William W. Wheelock and William G. Bierd, Receivers; Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis & Louisville Railway Company; Chicago Junction Railway Company; Chicago, Milwaukee and St. Paul Railway Company, and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers; The Chicago, Rock Island and Pacific Railway Company; Chicago, Terre Haute & Southeastern Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Grand Trunk Western Railway Company; Illinois Central Railroad Company; Indiana Harbor Belt Railroad Company; The Michigan Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; New York Central Railroad Company, New York, Chicago & St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; The Toledo, St. Louis & Western Railroad Company, and J. Frank Johnson and
14 Harry A. Dunn, Receivers; and Wabash Railway Company, all of which railroads and systems of transportation were operated and controlled by the predecessors in office of said Andrew W. Mellon during the period of Federal control of railroads, to-wit, December 28, 1917, to March 1, 1920. That all of said railroad companies and corporations last named have and during said period of Federal control had systems of transportation and roads running through the Eastern Division of the Northern District of Illinois, with the exception of The Toledo, St. Louis & Western Railroad Company, and J. Frank Johnson and Harry A. Dunn, Receivers, which railroad company is now a part of the system of the New York, Chicago & St. Louis Railroad Company, and which system has a road running through the Eastern Division of the Northern District of Illinois; that this court has jurisdiction of this cause of action under and pursuant to the terms of Section 206 of the act of Congress known

as the Transportation Act, 1920, and that this is a cause of action within the meaning of said section 206 over which this court would have had jurisdiction had it arisen against said railroad companies and corporations operating said railroads and systems of transportation but for Federal control.

(4) The Federal control of railroads terminated on February 29, 1920, and that the President of the United States, by proclamation dated February 28, 1920, did, pursuant to the provisions of section 206-a of the Transportation Act of 1920, designate Walker D. Hines Director General of Railroads, as the agent provided for in said section; and by proclamation dated May 18, 1920, did designate, as successor to the said Walker D. Hines, John Barton Payne, Director General of Railroads, as the agent provided for in said section; and by proclamation dated March 28, 1921, did designate as successor of the said John Barton Payne, James C. Davis, Director General of Railroads as the agent provided for in said section; and by proclamation dated December 14, 1925, did designate as successor to James C. Davis, the defendant Andrew W. Mellon, as the agent provided for in said section.

(5) That said defendants and the predecessors in office of said Mellon were, at all times during the period covered by this petition, common carriers for hire, engaged in the transportation of commerce, and as such, subject to the provisions of the act of Congress entitled "An Act to Regulate Commerce" approved February 4, 1887, and all acts supplemental thereto or amendatory thereof, including the "Federal Control Act" approved March 21, 1918.

(6) That this is a civil suit for damages by the plaintiffs against defendants for a violation of the Act of Congress known as the "Act to Regulate Commerce," as amended upon the facts in this pleading set forth for the sum of One hundred forty thousand and one dollars and twenty-five cents ($140,001.25) damages, and a reasonable attorney's fee, and that this court has jurisdiction of the parties and of the subject matter by virtue of the provisions of the Act to Regulate Commerce as amended and Transportation Act, 1920, as amended.

(7) Plaintiffs further allege that between December 28, 1917, and March 1, 1920, they shipped and paid charges thereon over the lines of the defendants from and to Union Stock Yards, Chicago, Illinois, numerous carloads of live stock, to-wit, five hundred sixty thousand and five carloads, (the date

of delivery, car number, waybill number, originating station, consignor, consignee, and amount of reparation claimed, being more specifically set forth in statements prepared in accordance with a ruling of the Commission, filed by plaintiffs with, and now in possession of the Interstate Commerce Commission, and which are too voluminous to insert herein and which would make this petition too extended and cumbersome but plaintiffs now make profert of the said statements) on which defendants unlawfully and unreasonably collected and received unlawful and unreasonable charges of 25 cents per carload as more fully appears in the order of the Interstate Commerce Commission hereto attached and marked "Exhibit A" to which reference is now made and which is made a part hereof as fully as though the same were here set out on to-wit, 560,005 carloads of live stock for loading or unloading same, aggregating one hundred forty thousand and one dollars and twenty-five cents ($140,001.25) in violation of the duty of defendants in that respect to collect only lawful and reasonable charges as required by the Act to Regulate Commerce as amended.

(8) That the unlawful and unreasonable charge herein complained of arose as follows:

That prior to May 21, 1917, there was in effect a tariff published and filed with the Interstate Commerce Commission by defendant, The Union Stock Yard and Transit Company, and which provided that charges of 25 cents for unloading each car of live stock and 50 cents for loading each car of live stock would be assessed by the defendant, The Union Stock Yard and Transit Company, on all cars of live stock loaded or unloaded by it at Union Stock Yards, Chicago, Illinois; that there was also in effect another tariff, published and filed with the Interstate Commerce Commission to which the railroad companies, the lines of which were operated by the predecessors in office of defendant, Andrew W. Mellon, as hereinabove set forth, were parties, and which provided that the sum of 25 cents for unloading each car of live stock and 50 cents for loading each car of live stock would be absorbed and paid by the railroad companies to The Union Stock Yard and Transit Company on all cars of live stock loaded or unloaded by that company at Union Stock Yards, Chicago, Illinois; that said latter tariff was Agent L. A. Lowry's Tariff 20-J, I. C. C. No. 37. That effective May 21, 1917, the defendant, The Union Stock Yard and Transit Company filed with the Interstate Commerce Commission its tariff I. C. C. No. 2,

wherein it increased said charges from 25 cents per car for unloading to 50 cents per car for unloading, and from 50 cents per car for loading to 75 cents per car for loading. That no tariff was filed whereby said railroad companies hereinabove referred to absorbed or paid said increase in said charges, and shippers and receivers of live stock, including plaintiffs, were compelled to and did pay the defendant, The Union Stock Yard and Transit Company, and the railroad companies hereinabove referred to, and effective with Federal control as aforesaid, defendants herein and the predecessors in office of said Mellon, an amount in excess of the former tariff charge for each car of live stock unloaded or loaded by The Union Stock Yard and Transit Company, as more specifically set forth in said statements as aforesaid, the amount in each instance being the difference between the amount of 25 cents for unloading each car, which amount the predecessors in office of the defendant, Andrew W. Mellon, during Federal control, absorbed and the amount of 50 cents for unloading each car, and the difference between the amount of 50 cents likewise absorbed for loading each car and 75 cents charged for loading each car.

16 (9) That effective September 1, 1917, the defendant, The Union Stock Yard and Transit Company, filed with the Interstate Commerce Commission a tariff canceling said The Union Stock Yard and Transit Company Tariff I. C. C. No. 2, and this new tariff was suspended from time to time by the Interstate Commerce Commission.

(10) Plaintiffs further allege that during the said period from December 28, 1917, to March 1, 1920, the stockyards of the defendant, The Union Stock Yard and Transit Company, were the terminals of the predecessors in office of the defendant, Andrew W. Mellon, in each of the shipments of live stock set forth in said statements as aforesaid.

(11) Plaintiffs further allege that it was the duty of the predecessors in office of the defendant, Andrew W. Mellon, and The Union Stock Yard and Transit Company in each of the shipments set forth in said statements as aforesaid, to load or unload, as the case might be, said live stock at the Union Stock Yards, Chicago, Illinois; that the loading and unloading of said live stock which was performed by defendant, The Union Stock Yard and Transit Company was part of the transportation of said live stock; that the collection of separate charges by defendants from plaintiffs, as aforesaid, was unlawful and unreasonable and the charges so

collected were unlawful and unreasonable charges in violation of the Interstate Commerce Act, as more fully and in detail appears in the said order of the Interstate Commerce Commission, a copy of which is hereto attached and marked "Exhibit B," and which is now referred to and made a part hereof as fully as though the same were here set out, to the damage of the plaintiffs in the amounts so paid.

(12) Plaintiffs further allege that upon the filing of the Union Stock Yard & Transit tariff I. C. C. No. 2, which was to be effective September 1, 1917, as aforesaid, there was filed with the Interstate Commerce Commission formal protest. That subsequent to the filing of said protest, said tariff was suspended from time to time by the Interstate Commerce Commission, and the matter set down for hearing by the Interstate Commerce Commission under Investigation and Suspension Docket No. 1118.

(13) That on or about October 2, 1917, the Chicago Live Stock Exchange, on behalf of its members and others engaged in the buying, selling and shipping of live stock at the Chicago Illinois stock yards, including the plaintiffs, filed a complaint with the Interstate Commerce Commission alleging and charging said loading and unloading charges to be unlawful, unjust and unreasonable under the Interstate Commerce Act; that the said Interstate Commerce Commission docketed said complaint under Interstate Commerce Commission Docket No. 9977, and the corporate carriers made defendants therein who are the same corporate carriers and railroads named herein filed answer thereto and the issues were duly made up; that said Docket 9977 and Investigation and Suspension Docket 1118 were consolidated for hearing, and that after full hearing thereon on or about February 11, 1919, the Interstate Commerce Commission issued its report and decision in said cause dismissing said complaint, said report and decision being reported in 52 I. C. C. 209, attached hereto as "Exhibit C" and made a part hereof as though fully set forth at this place.

(14) That on or about April 14, 1919, upon petition of the complainant in said complaint Interstate Commerce Commission Docket 9977 for rehearing and application of the complainant to amend its complaint by making the Di-
17 rector General of Railroads a party defendant, the Interstate Commerce Commission issued an order in said Docket 9977 and Investigation and Suspension Docket No. 1118 in words and figures as follows:

"Supplemental Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 14th day of April, A. D. 1919.

No. 9977

Chicago Live Stock Exchange

vs.

The Atchison, Topeka & Santa Fe Railway Company *et al.*
Investigation and Suspension Docket No. 1118.

In the Matter of the Investigation and Suspension of Live Stock Loading and Unloading Charges at Chicago, Ill.

Upon further consideration of the records in the above entitled proceedings, of petition for rehearing filed by the Chicago Live Stock Exchange and Union Stock Yard & Transit Company, and of application of the Chicago Live Stock Exchange to amend its complaint by making the Director General of Railroads a party defendant;

It Is Ordered, That these proceedings be, and they are hereby, reopened for further hearing, on the question of the amount of the loading and unloading charges for live stock at the Chicago stock yards, and the amount of such charges, if any, that should be imposed upon shippers of live stock, or should be absorbed by the defendants and whether the Chicago Stock Yards are terminals of the Chicago Junction Railway Company, and whether the tariff arrangements between the Union Stock Yards & Transit Company and the other defendants with respect to the delivery and handling of live stock at the Union Stock Yards in Chicago are in compliance with the act.

It Is Further Ordered, That the petition of the Union Stock Yard & Transit Company, so far as it seeks a reopening of the case for the purpose of reconsideration of the finding that it is a common carrier, be, and it is hereby, denied.

It Is Further Ordered, That Walker D. Hines, Director General of Railroads, be, and he is hereby, made an additional party respondent herein.

It Is Further Ordered, That a copy of this order be served upon each of the parties to these proceedings.

And It Is Further Ordered, That these proceedings be, and they are hereby, assigned for further hearing on May 20,

1919, ten o'clock a. m., at United States Court Room, Chicago, Ill., before Examiner Gerry.

By the Commission:

GEORGE B. McGINTY,
(Seal) *Secretary.*"

And thereafter said causes were reheard. The Director General was duly represented and took an active part in said proceedings. The said Interstate Commerce Commission, on or about July 15, 1920, issued its report on further hearing, reported in 58 I. C. C. 164, and found that the said unloading and loading charges were unlawful and in violation of the Interstate Commerce Act, said decision and report being attached hereto marked "Exhibit B" and made a part hereof to which reference is now made as though the same were fully set forth at this point.

(15) That the cause of action herein alleged against the defendants accrued between the dates of December 28, 1917, and February 28, 1920, and that within two years after December 28, 1917, the plaintiffs herein filed with the Interstate Commerce Commission their complaint for the recovery of damages, on to-wit, June 16, 1919, in compliance with the provisions of the Act to Regulate Commerce as amended. That, upon permission of the Interstate Commerce Commission, and without objection from the defendants herein,
18 all of whom were represented, counsel for the complainant in Docket No. 9977, on or about June 16, 1919, filed with the Interstate Commerce Commission, for the purpose of making them parties of record, a list of shippers upon whose behalf reparation was prayed and sought in said Docket No. 9977, said list containing, among others, the names of the plaintiffs herein; said list was duly registered and accepted by the Commission, and in its decision reported in 58 I. C. C. 164, "Exhibit B" hereto, the said Commission on July 15, 1920, found that the parties so made of record had been damaged by the assessment and collection of the loading and unloading charges hereinbefore described in the amount of such charges paid by them, and were entitled to reparation with interest from the date of the payment of such charges.

(16) That on or about February 25, 1921, the said Chicago Live Stock Exchange, on behalf of its members and other shippers of live stock to and from the stock yards at Chicago, Illinois, as named in its said complaint and in appendix A attached thereto, filed a complaint with the Interstate Com-

merce Commission against certain corporate carriers and against the defendants herein again alleging said loading and unloading charges to be unlawful, unjust and unreasonable and in violation of the Interstate Commerce Act and of the Federal Control Act, and the said Interstate Commerce Commission docketed said complaint under Interstate Commerce Commission Docket 12614. The defendants filed answers thereto and the issues were duly made up.

(17) The plaintiffs herein were named in the complaint in said Docket No. 12614 and/or appendix A attached thereto, and the said Interstate Commerce Commission thereupon held a public hearing at which evidence was taken and heard in said cause and further hearing in said Docket 9977, and after said hearing, and in all things proceeding legally and in accordance with the provisions of the Interstate Commerce Act, on or about June 2, 1925, issued its consolidated decision and report in said causes, in which it found that the loading and unloading charges above referred to and described were unjust and unreasonable, and that the plaintiffs herein were entitled to reparation with interest on account of the collection by the defendants herein of said unjust and unreasonable charges. Said decision and report is reported in 100 I. C. C. 266, and a copy thereof is attached hereto marked "Exhibit D" and made a part hereof as though fully set forth at this point.

(18) That as directed by the said reports and decisions of the Interstate Commerce Commission, attached hereto and made a part hereof as Exhibits B and D respectively, the statements hereinbefore described of shipments made by plaintiffs during the aforesaid period, on which defendants had collected charges at rates alleged by plaintiffs and found by the Interstate Commerce Commission to be unjust and unreasonable, were submitted to the Interstate Commerce Commission.

(19) That thereafter the said Interstate Commerce Commission issued its reparation order under date of December 12, 1927, said reparation order being attached hereto and marked "Exhibit A", and made a part hereof to the same extent as though the same were here set out.

(20) That on May 14, 1928, the Interstate Commerce Commission issued its Supplemental Report and order in said cause (144 I. C. C. 175), said report and order being attached hereto marked "Exhibit E" and made a part hereof as though fully set forth at this point.

(21) That on November 27, 1928, the Interstate Commerce Commission issued its further order in said cause, said order being attached hereto marked "Exhibit F" and made a part hereof as though fully set forth at this point.

19 (22) That the said order of the Interstate Commerce Commission directing the said defendants therein and who are named herein to pay the aforesaid damages to plaintiffs was duly served upon the defendants herein, but though often requested, the said defendants have failed and refused, and still fail and refuse to pay the said sums, or any part thereof to the plaintiffs; to the damage of the said plaintiffs in the sum of One hundred forty thousand and one dollars and twenty-five cents ($140,001.25) with interest, as more specifically set forth in the copy of said reparation order attached hereto as "Exhibit A" and in addition thereto a reasonable attorney's fee; Wherefore by reason of the premises the defendants have become and are indebted to the plaintiffs in the said sum of One hundred forty thousand and one dollars and twenty-five cents ($140,001.25) and interest thereon at six per cent per annum and in addition thereto a sum of money as a reasonable attorney's fee as provided by statute and the plaintiffs, therefore, pray judgment against the defendants in the sum of One Hundred forty thousand one dollars and twenty-five cents ($140,001.25) with interest thereon at six per cent per annum together with a reasonable attorney's fee as aforesaid, to be taxed and collected as part of the costs of the suit as authorized by law.

SIMS GODMAN & STRANSKY,
Illinois Merchants Bank Building
Chicago, Illinois
Attorneys for Plaintiffs.

EDWIN W. SIMS,
ELWOOD G. GODMAN,
FRANKLIN J. STRANSKY,
C. R. HILLYER,
Of Counsel.

December 8, 1928.

20-76 * * * EXHIBIT A * * (Omitted per stipulation filed November 10, 1930. See Plaintiffs' Exhibit 4, Bill of Exceptions.)

77-79 * * EXHIBIT B * * * (Omitted per stipulation filed November 10, 1930. See Plaintiffs' Exhibit 2, Bill of Exceptions.)

80-88 * * * EXHIBIT C * * * (Omitted per stipulation filed November 10, 1930. See Plaintiffs' Exhibit 1, Bill of Exceptions.

89-93 * * * EXHIBIT D * * * (Omitted per stipulation filed November 10, 1930. See Plaintiffs' Exhibit 3, Bill of Exceptions.)

94-95 * * * EXHIBIT E * * * (Omitted per stipulation filed November 10, 1930. See Plaintiffs' Exhibit 5, Bill of Exceptions.)

96-97 * * * EXHIBIT F * * * (Omitted per stipulation filed November 10, 1930. See Plaintiffs' Exhibit 6, Bill of Exceptions.)

98 And on, to wit, the 22nd day of January, 1929 came the Defendant by his attorneys and filed in the Clerk's office of said Court their certain Appearance in words and figures following, to wit:

99 * * (Caption) * *

I hereby enter the appearance of Andrew W. Mellon Director General of Railroads, as Agent, etc. defendant, and myself as his attorneys in the above-entitled cause.

EDGAR R. HART,
M. G. DE QUENDO &
A. A. MCLAUGHLIN,
Said Defendant's Attorney.

30. 100 And on, to wit, the 30th day of January, 1929 came the Union Stock Yards & Transit Company, a corporation by its attorneys and filed in the Clerk's office of said Court their certain Appearance in words and figures following, to wit:

101 * * (Caption) * *

APPEARANCE.

We hereby enter the appearance of The Union Stock Yard and Transit Company, a corporation, defendant in the above entitled cause and that of ourselves as its counsel.

WINSTON, STRAWN & SHAW
Attorneys for said defendant.

102 And on, to wit, the 30th day of January 1929 came the parties by their attorneys and filed in the Clerk's office of said Court a certain Stipulation in words and figures following, to wit:

103 * * (Caption) * *

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the time of defendant in which to file an answer in the above entitled cause, shall be extended, subject to the approval of the court, up to and including the 15th day of April, 1929.

SIMS, GODMAN & STRANSKY
Attorneys for Plaintiffs.

A. A. McLAUGHLIN
EDGAR L. HART
M. G. DE QUENDO
WINSTON, STRAWN & SHAW
Attorneys for Defendants.

104 And afterwards, to wit, on the 30th day of January 1929, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter District Judge, appears the following entry, to wit:

105 * * (Caption) * *

Wednesday, January 30, 1929.

Present: Honorable George A. Carpenter, Judge of said Court.

On stipulation of the parties to this suit filed herein It Is Ordered that the time within which the defendant is to plead answer or demur to the plaintiffs' Declaration filed in said cause be and the same is hereby extended to and including April 15, A. D. 1929.

106 And on, to wit, the 5th day of April, 1929, came the Union Stock Yard & Transit Company of Chicago by its attorneys and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit: Filed A 1929

107 * * (Caption) * *

ANSWER OF THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, DEFENDANT HEREIN.

Now comes The Union Stock Yard and Transit Company of Chicago, defendant herein, and for answer to the petition of plaintiffs filed herein, says:

1. Answering the allegations of paragraph 1 of said petition, this defendant denies that the plaintiffs listed in said paragraph paid to this defendant any amounts because of the service of loading and unloading shipments of live stock made or received by the plaintiffs at the Union Stock Yards, in Chicago, Illinois, and denies that any such amounts were illegally collected or received by this defendant for or on account of said service.

2. Answering the allegations of paragraph 2 of said petition, this defendant admits the entry of an order by the Interstate Commerce Commission on December 12, 1927, as alleged by plaintiffs, but denies that the list of plaintiffs as set out in said paragraph of said petition is the same as the list of plaintiffs to which the said Commission awarded reparation in its said order of December 12, 1927.

108 3. Answering the allegations of paragraph 3, 4 and 5 of said petition, this defendant admits that it is a cor-

poration organized and existing under the laws of the State of Illinios, with its principal office and place of business at Chicago, in said State, but denies that it is now or was at any time mentioned in said petition a common carrier for hire engaged in the transportation of interstate or interstate commerce and as such subject to the Act to Regulate Commerce and Acts supplemental thereto or amendatory thereof. Further answering, this defendant says, that at no time was it taken under Federal Control by the United States Railroad Administration and was at no time operated by any Director General of Railroads under the Federal Control Act or the Transportation Act, 1920.

4. Answering the allegations of Paragraph 7 of said petition, this defendant says that it does not have sufficient information with respect to or knowledge of the shipments referred to in said paragraph to form a belief with respect thereto, and therefore denies said allegations and requires strict proof thereof. The defendant denies, however, that any shipments in Interstate Commerce were made over its line from and to the Union Stock Yards at Chicago, Illinois, and says that it does not now, and did not, at any time mentioned in said petition, own or operate a railroad of any kind whatsoever, and that it could not, therefore, engage in the transportation of any shipments as alleged by planitiffs. Further answering the allegations of said paragraph, this defendant specifically denies that at any time it unlawfully and unreasonably collected and received unlawful and unreasonable charges for the loading and unloading of live stock, at the Union Stock Yards in Chicago, Illinois, in violation of the Act to Regulate Commerce, as amended, or
109 any other law. Further answering the allegations of said paragraph, this defendant says that for its service in loading and unloading shipments of live stock at said yards at all times mentioned in the petition herein, and for the use of its facilities used in such service, it collected from the railroads hauling said shipments into or out of Chicago, charges contained in its tariffs then published and filed with the Interstate Commerce Commission; that said charges had been approved by said Commission as being proper charges to be collected by this defendant from said railroads, for such service and the use of such facilities; that in every instance, said service was performed by this defendant for and on behalf of the railroad from which the said charge was collected, and that in no instance was said charge collected by

this defendant from the shipper or consignee of any shipments. This defendant further says that in performing the service of loading and unloading live stock at the Union Stock Yards at Chicago, during all times mentioned in the petition filed herein, it was acting as the agent of the railroad or line haul carrier hauling said shipments into or out of said yards, and did not perform a common carrier service on its own behalf with respect to any of said shipments. The defendant therefore denies that it received from Plaintiffs the sum of one hundred forty thousand and one dollars and twenty-five cents ($140,001.25), or any other sum, as compensation for loading or unloading live stock at the Union Stock Yards in Chicago, or as compensation for any other common carrier service performed by this defendant.

5. Answering the allegations of paragraph 8 of said petition, this defendant admits that prior to May 21, 1917, it had in effect its tariff published and filed with the Interstate Commerce Commission, making a charge of 25c for unloading each car of live stock and 50c for loading each car of live stock at the Union Stock Yards at Chicago; and says
110 that the service was performed by it for and on behalf of, and said charges were paid to it by the railroads hauling such shipments of live stock into and out of said Stock Yards. This defendant further admits that on May 21, 1917, by tariff duly published and filed with the Interstate Commerce Commission, it increased said charges to 50c for unloading each car of live stock and to 75c for loading each car of live stock at said Stock Yards, but denies that under and by virtue of said tariff the plaintiffs herein or any receiver or shipper was compelled to and did pay to this defendant for any service performed by it, any amount whatsoever for the loading or unloading of any shipments of live stock to or from said Stock Yards, and says that in the case of every shipment of live stock which was loaded or unloaded at said Stock Yards, subsequent to the publication and filing of said tariff, the service of loading or unloading was performed by this defendant for and on behalf of, and said charge was collected from, the railroad handling said car into or out of said Stock Yards, in accordance with the provisions of said tariff. Further answering, this defendant says that if plaintiffs paid any charges for the loading or unloading of live stock at said Stock Yards, said charges were not paid to this defendant for any service performed by it, nor by reason of any tariff published and filed by this defend-

ant, but were paid to the railroads hauling said shipments into and out of said Yards and that this defendant had no connection therewith or interest therein.

6. This defendant admits the allegations of paragraphs 9 and 10 of said petition.

7. Answering the allegations of paragraph 11 of said petition, this defendant denies that there was any duty or obligation whatsoever on its part to the plaintiffs herein, to either load or unload any shipments of live stock made to
111 or from the Union Stock Yards at Chicago by the plaintiffs herein, and denies that it performed any transportation service in its own behalf by loading and unloading shipments at said yards for and on behalf of the railroads hauling such shipments to and from said Yards, and denies that it collected on its own behalf any charges of any character for said service of loading or unloading from said plaintiffs. Further answering, this defendant says that the only charges collected by it for the service of loading or unloading any shipments of live stock at said Yards were collected by it from the railroads which handled said shipments into or out of the yards and were assessed and collected in accordance with this defendant's tariff duly published and filed by it with the Interstate Commerce Commission. Further answering, this defendant says that in loading or unloading any shipment of live stock at said Yards, it was performing a service for and on behalf of the railroads hauling such live stock into or out of said Yards, and as their agent, and denies that any charges assessed and collected by it from said railroads with respect to any of said shipments were unjust or unreasonable or in any way in violation of the Act to Regulate Commerce or any other law.

8. Answering the allegations of paragraph 12 and 13 of said petition, this defendant admits that upon the filing of its tariff, effective September 1, 1917, formal protests were filed with the Interstate Commerce Commission, and that said tariff was suspended from time to time by said Commission and the mater set down for hearing under its Investigation and Suspense Docket No. 1118. Further answering, this defendant admits that on or about October 2, 1917, the Chicago Live Stock Exchange filed a complaint with the Interstate Commerce Commission under its Docket No. 9977, but denies that in said complaint the loading and unload-
112 ing charges contained in ths defendant's tarff then on file with the Interstate Commerce Commission were assailed

as unlawful, unjust and unreasonable under the Act to Regulate Commerce. This defendant admits that thereafter said Dockets 1118 and 9977 were consolidated for hearing and that a report and decision thereon was made by the Interstate Commerce Commission, said report and decision being reported at 52 I. C. C. 209.

9. Answering the allegations of paragraph 14 of said petition, this defendant admits that the order set out therein was issued by the Interstate Commerce Commission on or about April 14, 1919, and admits that upon a further hearing of said causes, the Interstate Commerce Commission issued its further report therein, reported at 58 I. C. C. 164. Further answering this defendant denies that in said decision and report said Commission found the charges for loading and unloading live stock at the Union Stock Yards at Chicago were unlawful or in violation of the Interstate Commerce Act or any other law, and says that in said decision said Commission approved the loading and unloading charges of this defendant then published and filed with it. Further answering this defendant denies that the Interstate Commerce Commission acquired or had any jurisdiction to make any finding in said proceeding that plaintiffs were entitled to receive any reparation from it because of any shipment made by said plaintiffs, and denies that said Commission acquired or had any jurisdiction to make an order requiring this defendant to make any payment of money.

10. Answering the allegations of paragraph 15 of said petition this defendant denies that plaintiffs filed with the Interstate Commerce Commission, within two years after December 28, 1917, their complaint for the recovery of damages in compliance with the law. This defendant admits
that counsel for complainant in Docket 9977, filed with
113 said Commission an alleged list of shippers but denies
that said list was filed with the permission of said Commission or that it was registered and accepted by said Commission, and denies that any prayer for reparation in behalf of said alleged shippers or any of them, was filed in said proceeding and denies that said list contained the names of the plaintiffs herein, and says that said list was filed after the taking of testimony in said proceedings had been completed and the hearings concluded, without notice to this defendant and without service upon it. Further answering, this defendant says that the filing of said list did not operate to make the parties named therein parties to said proceeding,

through intervention or otherwise, and did not constitute a complaint, intervention or claim for reparation against this defendant on behalf of any party named therein, and that it did not give to the Interstate Commerce Commission jurisdiction to consider any claim against the defendant on behalf of any person or corporation named in said list nor jurisdiction or authority to make any finding or order against this defendant on account of any of said persons or corporations or on account of any claim in behalf of them. This defendant further denies that said Commission ever found that the parties whose names were included in said list had been damaged by the assessment of the loading and unloading charges hereinbefore referred to, or that said Commission found that any of said parties had paid such charges or that any of them was entitled to reecive reparation from this defendant because of any such payment. Further answering, this defendant says that there is no testimony or evidence in any proceeding before the Interstate Commerce Commission, with respect to any shipment made by any person or corporation named on said list, or by plaintiffs which would justify any finding or order against this defendant on any such shipment, and that any finding or order
114 against this defendant in favor of any such person or corporation or in favor of plaintiffs would be, if made by said Commission, without any evidence in the record in support thereof and wholly without jurisdiction.

11. Answering the allegations of paragraphs 16 and 17 of said petition, this defendant admits that a petition was filed by the Chicago Live Stock Exchange with the Interstate Commerce Commission under its Docket 12614, on or about February 25, 1921, but denies that said petition assailed the loading and unloading charges collected by this defendant as unlawful or in violation of the Interstate Commerce Act or any other law, and denies that plaintiffs were then members of the Chicago Live Stock Exchange, or that they were named as complainants in said petition. Further answering, this defendant admits that the Commission made a consolidated decision and report in said case and Docket 9977, after further hearing, said decision and report being reported at 100 I. C. C. 266, but denies that in said decision it was found that the loading and unloading charges of this defendant were unjust and unreasonable, and denies that said Commission found that plaintiffs were entitled to reparation from this defendant, because of any such charges paid by them to this

defendant. Further answering this defendant says that plaintiffs were not parties to said proceeding and made no claim therein against this defendant; that no hearing was had in said proceeding on any claim for reparation by plaintiffs against this defendant, and that therefore any order of the Interstate Commerce Commission requiring this defendant to make any payment of money to plaintiffs would be invalid as being without any evidence to support it and act within the jurisdiction of said Commission. Further answering, this defendant says that paragraph 3 of Section 16
of the Interstate Commerce Act, provides that all claims
115 for the recovery of damages shall be filed with the Interstate Commerce Commission within two years from the time the cause of action accrues and not after; that no claim for the amount herein sued for was filed with said Commission within the time allowed by the Interstate Commerce Act and that therefore, the said Commission was without jurisdiction to consider such claims or to make any findings or orders with respect thereto. This defendant further says that said Commission did not proceed in accordance with law in said proceeding, and that in so far as it attempted to deal with any claim of plaintiffs against this defendant, it acted unlawfully and without jurisdiction and its findings and orders are void and without effect.

12. Answering the allegations of paragraph 18, 19, 20 and 21 of said petition, this defendant admits that on December 12, 1927, May 14, 1928 and November 27, 1928, the Interstate Commerce Commission made its further orders in said cause, but denies that in any of said orders or in any of the orders theretofore entered by the Commission in said cause, the Interstate Commerce Commission found any charges of this defendant to be unjust and unreasonable or in any other way in violation of the law. Further answering, the allegations of said paragraphs, this defendant says that it has no knowledge as to whether or not any statements were filed with the Interstate Commerce Commission by plaintiffs, as alleged by them, and that therefore it denies said allegation and requires strict proof thereof. Further answering this defendant says that plaintiffs were not parties to the proceeding in which any of said orders were entered through intervention or otherwise; that no claim was made in said proceedings against this defendant for reparation; that no issue involving any such claim was presented and that there was

no testimony thereon; that any claim of plaintiffs against
116 this defendant was then barred by the limitation contained in paragraph 3 of Section 16 of the Interstate Commerce Act; that therefore said Commission had no authirty or jurisdiction to enter said orders and that said orders are wholly void and without force or effect in so far as they undertake to establish a liability of this defendant to plaintiffs.

13. This defendant admits the allegations of paragraph 22 of said petition, except that it denies that by virtue of anything therein alleged, plaintiffs have been damaged in any amount or amounts whatsoever or are entitled to recover any amount whatsoever from this defendant.

14. Further answering said petition, this defendant says that all of the findings and orders of the Interstate Commerce Commission relied on in said petition were and are without support in any evidence or testimony offered on any hearing before said Commission, and are contrary to law; that on the dates of the awards sued on herein, any claim of the plaintiffs against this defendant, accruing prior to February 28, 1920, was barred by the limitation contained in Paragraph 3 of Section 16 of the Interstate Commerce Act; that therefore, said Commission was at all times without jurisdiction or authority to make any award in favor of plaintiffs and against this defendant, and that the awards and findings sued on in this case are entirely void and without legal effect.

15. Further answering said petition, this defendant says, that at all the times and during all the periods mentioned in said petition, the duty of loading and unloading live stock at the Union Stock Yards, in Chicago, was a duty of the shippers or receivers of the stock or of the railroads handling such stock into and out of said Yards; that at no time was any duty with respect to the loading and unloading of such stock cast upon this defendant through operation of law or otherwise. This defendant further says that the duty and obli-
117 gation to load and unload such stock had been assumed by the railroads hauling such stock into and out of said Yards; that in loading and unloading live stock at said Yards, it therefore acted only as the agent of such railroads and that the charge collected by it was collected from such railroads as compensation for the service performed by this defendant for and on behalf of such railroads and as compensation for the use by such railroads of the loading and unloading facilities belonging to this defendant. Further answering this defend-

ant says that in loading and unloading live stock at said Yards, it was never acting on its own behalf and that in performing said service and furnishing facilities therefor, it never performed any common carrier service for its own account; that it was never under any circumstances, a party to the transportation of said live stock through contract or otherwise, and that it was never a party to any tariffs of any railroad, which contained rates and charges for the transportation of live stock, and did not, under any circumstances participate in such rates or charges or receive any part thereof; that it never performed any service on its own behalf over which the Interstate Commerce Commission had jurisdiction; that therefore the Interstate Commerce Commission in the proceedings referred to in the petition filed herein, had no jurisdiction over this defendant, and that said Commission erred in finding in its reports and decisions entered in said proceedings that this defendant was a common carrier and that when it loaded and unloaded live stock at said Yards, it was rendering a common carrier service in the transportation of said stock.

16. This defendant further says that in its report and decision, reported at 58 I. C. C. 164, the Interstate Commerce Commission found and held that the duty of loading and unloading live stock at the Union Stock Yards at Chicago, 118 Illinois, rested upon the railroads hauling such stock into and out of said Yards, and not upon this defendant; that said service, when performed by this defendant, was a service of the railroads to the shipper or receiver, which said railroads were obligated by law to perform, either themselves or through this defendant as their agent. Defendant says, therefore, that said Commission had no authority or jurisdiction to make any order requiring this defendant to make any payment to plaintiffs by way of reparation or otherwise and that any such order or orders are null and void and of no legal effect whatsoever.

Wherefore, this defendant prays that said petition may be dismissed as to it and for costs.

THE UNION STOCK YARDS AND TRANSIT COMPANY OF CHICAGO
By WINSTON, STRAWN & SHAW
Its Attorneys.

RALPH M. SHAW
FRANK H. TOWNER
Of Counsel.

r. 8, 119 And on, to wit, the 8th day of April 1929 came the Andrew M. Mellon as Agent etc. by his attorneys and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

120 * * (Caption) * *

ANSWER OF ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT.

To the Honorable Judge of Said Court:

Andrew W. Mellon, Director General of Railroads, as agent, one of the defendants in the above entitled suit, for answer to the petition of the plaintiffs filed therein states:

1. This defendant admits that some of the persons mentioned in paragraph 2 of said petition and described as plaintiffs were named in a certain pretended order of the Interstated Commerce Commission, purporting to be entered December 12, 1927, but states that many of the persons named in said paragraph 2 are not named in said pretended order, and further states that the Interstate Commerce Commission was without jurisdiction to enter the said pretended order so entered on December 12, 1927, and was without authority or jurisdiction in entering said pretended order to require this defendant to pay the said persons, firms or corporations named in said paragraph 2 of said petition or any of them any amount as reparation or damages, and the said pretended order furnishes no basis for the allowance of damages against this defendant in favor of said persons, firms
121 or corporations, or any of them.

2. This defendant admits that the defendant, Union Stock Yards & Transit Company, is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business at Chicago in said State of Illinois. This defendant further admits that he occupies the position of Director General of Railroads as agent designated by the President of the United States, pursuant to the provisions of Section 206-A of the Transportation Act 1920, and as such agent is the officer against whom actions at law may be brought based on causes of action arising out of the possession, use or operation by the President of railroads and systems of transportation during the period of Federal Con-

trol of railroads, of such character as prior to Federal Control could have been brought against the carrier owning any such system of transportation.

Defendant admits that the railroads named in said paragraph 3 were in the possession, use and operation of the President during the period of Federal Control, but denies that the persons named as receivers of the Chicago & Alton Railroad Company and the Chicago, Milwaukee & St. Paul Railway Company were receivers of such companies or either of them prior to or during the period of Federal Control of Railroads, but states that such persons were appointed receivers for such companies respectively subsequent to the termination of Federal Control of railroads.

This defendant denies each and every allegation in said paragraph 3 of said petition, not herein expressly admitted.

3. This defendant admits the allegations contained in paragraph 4 of said petition.

122 4. For answer to paragraph 5 of said petition, this defendant admits that the said railroads so in the possession, use and operation of the President, were at all times during the period of Federal Control of Railroads operated as common carriers for hire, engaged in transportation in both intrastate and interstate commerce, under and in accordance with the provisions of the Federal Control Act, approved March 21, 1918, but denies that said systems of transportation were operated subject to the provisions of the Act of Congress entitled an "Act to Regulate Commerce," approved February 4, 1887, or subject to the acts supplemental thereto or amendatory thereof, except in so far as expressly provided in said Federal Control Act.

5. For answer to paragraph 6 of said petition, this defendant admits that this is a civil suit for damages for alleged violation of the act of Congress known as an "Act to Regulate Commerce," and admits that the petition prays for damages in the sum of One Hundred Forty Thousand One and 25/100 ($140,001.25) Dollars, and attorneys' fees, but expressly denies that this court has jurisdiction of the parties or of the subject matter by virtue of the provisions of the Act to Regulate Commerce as amended, and Transportation Act 1920 as amended, and alleges that the provisions of the Transportation Act 1920 with reference to complaints praying for reparation on account of damage claimed to have been caused by reason of the collection, or enforcement by or through the President during the period of Federal Control,

of rates, fares, charges, classifications, regulations or practices which are unjust, unreasonable, unjustly discriminatory or unduly or unreasonably prejudicial or otherwise in violation of the Interstate Commerce Act, were not complied
123 with by the persons, firms and corporations described and designated as plaintiffs herein or any of them in reference to the matters complained of and the Interstate Commerce Commission acquired and had no jurisdiction to enter or make any order against this defendant or in favor of any of the said alleged plaintiffs.

6. Fo answer to paragraph 7 of said petition, this defendant expressly denies that the persons, firms or corporations described and designated as plaintiffs in this suit or any of them shipped or paid charges on any shipments of livestock over the line of railroad and systems of transportation described in paragraph 3 of said petition during the period of Federal Control of Railroads, and expressly denies that the said alleged plaintiffs or any of them paid any amount to the Director General of Railroads or his representatives during the period of Federal Control of railroads or thereafter on account of loading or unloading carloads of livestock at Union Stock Yards, Chicago, Illinois.

Further answering said paragraph 7 and in response to profert made therein, this defendant requests and demands that the statements setting forth date of delivery, car number, waybill number, originating station, consignee and amount of reparation claimed, alleged to have been filed with and to be now in the possession of the Interstate Commerce Commission be furnished this defendant for examination and for use in preparing his defense, and that same be furnished this defendant within a reasonable time after the filing of this answer.

7. For answer to paragraph 8 of said petition, this defendant admits that prior to May 21, 1917, there was in effect a tariff published and filed with the Interstate Commerce Commission by Union Stock Yard & Transit Company, provid-
ing for charges of twenty-five cents for unloading each
124 car of livestock and fifty cents for loading each car of livestock at Union Stock Yards, Chicago, and that such charges were assessed by the Union Stock Yard & Transit Company on all cars of livestock loaded or unloaded by it at said place. That there was in effect a tariff published and filed with the Interstate Commerce Commission, to which the railroad companies named in paragraph 3 of said petition

were parties, which provided that the sum of twenty-five cents for unloading and fifty cents for loading each car of livestock at Union Stock Yards, Chicago, would be absorbed and paid by said railroad companies to Union Stock Yard & Transit Company on all cars of live stock transported over their respective lines and loaded or unloaded by the said Union Stock Yard & Transit Company at said place, said tariff being Agent L. A. Lowry's tariff 20-J, I. C. C. No. 37. This defendant further admits that effective May 21, 1917, the Union Stock Yard & Transit Company filed with the Interstate Commerce Commission its tariff I. C. C. No. 2, increasing charges for loading and unloading livestock at Union Stock Yards, Chicago, making the charge for unloading fifty cents and the charge for loading seventy-five cents per car, and that no tariff was filed by said railroad companies or by the Director General of Railroads providing for the absorption of said increased charges. This defendant admits that shippers of livestock were required to pay the Union Stock Yard & Transit Company said additional charges, but denies that any or either of the persons, firms or corporations named and designated as plaintiffs herein, or any other shipper or any receiver of livestock paid such increased charges to the said railroad companies or either of them and denies that any or either of said parties named and designated as plaintiffs herein or any shipper or receiver of livestock paid such increased charges for loading or unloading or any charge whatever therefor to the Director General of Railroads or to this defendant or any of his predecessors.

Defendant expressly denies that any of the persons, firms or corporations named and designated as plaintiffs herein paid to him or any predecessor in office or to the Director General of Railroads any amount as a loading or unloading charge for loading or unloading at Union Stock Yards, Chicago, any shipment of livestock whatever.

Further answering said paragraph 8, this defendant admits that pursuant to tariffs in effect, unloading charges in the sum of twenty-five cents and loading charges in the sum of fifty cents were absorbed by carriers under Federal Control in reference to all carloads of livestock transported to or from said Union Stock Yards by carriers under Federal Control during the Federal Control period.

8. For answer to paragraph 9 of said petition, this defendant admits the allegations therein are true.

9. For answer to paragraph 10 of said petition, this de-

fendant denies that during the said period of Federal Control from December 28, 1917, to March 1, 1920, the Stock Yards of the Union Stock Yard & Transit Company were the terminals of the predecessors in office of this defendant or of the Director General of Railroads with respect to any shipment of livestock moving over the lines of carriers and systems of transportation under Federal Control.

10. For answer to paragraph 11 of said petition, this defendant expressly denies that it was the duty of the predecessors in office of this defendant or of the Director General of Railroads to load or unload livestock transported to or from Union Stock Yards, Chicago, upon lines of railroad under Federal Control. This defendant admits that the loading
126 and unloading of livestock at said place was a part of the transportation of such livestock, but denies that such loading and unloading was a part of the transportation thereof furnished by carriers under Federal Control. This defendant expressly alleges that the loading and unloading of of livestock at said place was a transportation service undertaken and performed by Union Stock Yards & Transit Company, a connecting carrier, pursuant to its tariffs duly filed with the Interstate Commerce Commission, and that all charges made for such services in reference to livestock transported to or from said Stock Yards by carriers under Federal Control were made by and paid to the said Union Stock Yard & Transit Company.

Defendant expressly denies the collection of separate charges for loading and unloading such livestock was unlawful or unreasonable and in violation of the Interstate Commerce Act, and expressly denies that the parties named as plaintiffs herein or any of them have been damaged on account of the collection of such charges on livestock transported to or from Union Stock Yards, Chicago, during the period of Federal Control of Railroads over lines of railroad under Federal Control of Railroads.

11. For answer to paragraph 12 of said petition, this defendant admits protests were filed with the Interstate Commerce Commission as therein alleged, and that the tariff referred to was suspended from time to time by the Interstate Commerce Commission, and that said matter was set down for hearing under investigation and suspension docket No. 1118.

12. For answer to paragraph 13 of said petition, this defendant admits that on or about October 2, 1917, the Chicago

Live Stock Exchange filed a complaint with the Interstate Commerce Commission, as in said paragraph alleged, and
127 that same was docketed under I. C. C. Docket No. 9977, and that various railroad companies were made defendants; that said Docket 9977 and I. & S. Docket 1118 were consolidated for hearing and on February 11, 1919, the Interstate Commerce Commission issued its report and decision in said cause, dismissing said complaint, said report and decision being reported in 52 I. C. C. 209.

13. For answer to paragraph 14 of said petition, this defendant admits that on or about April 14, 1919, upon petition of the Chicago Live Stock Exchange, a rehearing of said matters involved in I. C. C. Docket 9977 and I. & S. Docket 1118 was granted by supplemental order of the Commission, a copy of which is set out in said paragraph. This defendant alleges that the Director General of Railroads was not a party to the said proceeding prior to April 14, 1919, and that the said supplemental order did not purport to make the Director General of Railroads a defendant in said Docket 9977, but purported to make the Director General of Railroads a party respondent in I. & S. Docket No. 1118 only.

Further answering said paragraph, this defendant alleges that the Director General of Railroads was not served with said order or with any complaint in either of said proceedings, did not appear therein or participate in the rehearing of said matters, and no claim for reparation was filed or made in said proceedings either by the claimants therein or by any or either of the parties named or designated as plaintiffs in this suit by petition of intervention or otherwise, and this defendant expressly denies that the Director General of Railroads was represented in said proceedings by an attorney or otherwise, and denies that the Director General took any part in said proceedings.

128 Further answering said paragraph 14, this defendant admits that on or about July 15, 1920, the Interstate Commerce Commission issued its report on said further hearing, which is reported and published in 58 I. C. C. 164. This defendant expressly denies that the Interstate Commerce Commission acquired or had jurisdiction to make any finding in said proceeding that the parties named as plaintiffs in this suit or any or either of them was entitled to reparation from the Director General or from the agent appointed pursuant to Section 206-A, Transportation Act 1920, on account of any

shipments of livestock during the period of Federal Control of railroads, and expressly denies that the said Interstate Commerce Commission acquired or had jurisdiction in said proceedings to make any order requiring the Director General of Railroads or the said Agent to make reparation or to make any payment of money to the parties named as plaintiffs herein or any of them, and denies that the Interstate Commerce Commission acquired or had jurisdiction therein to make any order against the Director General of Railroads or against the said agent, and denies that the Interstate Commerce Commission made or attempted to make any order therein in favor of the parties named as plaintiffs in this suit, or any of them, and against either the Director General of Railroads or the agent appointed pursuant to Section 206-A, Transportation Act 1920.

14. For answer to paragraph 15 of said petition, this defendant expressly denies that within two years after December 28th, 1917, the persons, firms or corporations designated as plaintiffs herein or any of them filed with the Interstate Commerce Commission a complaint for the recovery of damages from the Director General of Railroads, and expressly denies that said alleged plaintiffs or any of them
129 filed such complaint on June 16, 1919, and expressly denies that said parties designated as plaintiffs filed such a complaint against the Director General of Railroads in compliance with the provisions of the Act to Regulate Commerce, as amended, and denies that said parties designated as plaintiffs or any of them filed a complaint of the character described and as alleged in said paragraph 15, as against the Director General of Railroads.

This defendant admits that on June 16, 1919, counsel for the Chicago Live Stock Exchange filed an alleged list of shippers with the Interstate Commerce Commission in the said proceedings aforesaid, but this defendant denies that same was filed with permission of the Interstate Commerce Commission and denies that any prayer for reparation in behalf of said alleged shippers or either of them was filed in said proceeding, and denies that said list was duly registered and accepted by the Commission.

This defendant further alleges that said list was filed after the taking of the testimony in said proceedings had been completed and the hearings therein concluded and without notice to the Director General of Railroads, and without service upon the Director General of Railroads, and, as this

defendant is informed and believes and therefore alleges, without service upon and without notice to any of the parties to said proceedings. That the said parties designated as plaintiffs in this suit were not named in said list, nor were any of said parties named therein.

Further answering said paragraph, this defendant alleges that the filing of said list did not make the parties named therein parties to said proceeding, nor did the filing of said list constitute an intervention or a complaint or claim
130 for reparation against the Director General of Railroads, in behalf of the said alleged shippers named in said list or any or either of them, nor did the filing of said list give the Interstate Commerce Commission jurisdiction to consider any claim on behalf of any person, firm or corporation named in said list as against the Director General of Railroads, nor did same give the Interstate Commerce Commission jurisdiction or authority to make any finding or order against the Director General of Railroads on account of any of said persons, firms or corporations named in said list on account of any claim in behalf of said parties or any or either of them. This defendant further alleges that the Interstate Commerce Commission did not in its decision in said matter find that the said parties named in said list or either of them had been damaged by the assessment of loading and unloading charges on carloads of livestock at Union Stockyards, Chicago, during the period of Federal Control of Railroads, nor did the Commission find that the said parties named in said list or any of them paid any such loading or unloading charges or that such parties or any or either of them was entitled to reparation on account of paying such charges as against the Director General of Railroads or as against the agent appointed by the President, pursuant to Section 206-A, Transportation Act, 1920.

This defendant, for further answer to said paragraph, further alleges that no testimony was taken after the filing of said list, and that no testimony was taken in said proceedings in reference to any shipment made by persons, firms or corporations named in said list, and any finding or order in respect to a claim of any or either of said persons, firms or corporations named in said list as against the Director General of Railroads or as against the said agent if made by the
131 Interstate Commerce Commission would be without any evidence in the record in support thereof, and wholly without jurisdiction and void.

15. For answer to paragraph 16 of said petition, this defendant admits that on or about February 25, 1921, the Chicago Livestock Exchange filed a complaint with the Interstate Commerce Commission against the Union Stock Yard & Transit Company, certain corporate carriers and against the then agent appointed pursuant to Section 206-A, Transportation Act 1920, assailing the loading and unloading charges made by the Union Stock Yard & Transit Company of Chicago for loading and unloading livestock at its said yards, as unlawful, unjust and unreasonable, and in violation of the Interstate Commerce Act, and admits that same was docketed as I. C. C. Docket No. 12614, and that defendants filed answers thereto.

Defendant admits that attached to said complaint was a list of persons, firms and corporations alleged to be shippers, said list being designated Appendix "A," but defendant denies that the persons, firms and corporations named as plaintiffs herein or any or either of them were included in said list, and denies that the parties named in said list thereby became parties complainant in said matter, and denies that the said complaint constituted any claim for reparation against the Director General of Railroads or against the agent appointed under Section 206-A, Transportation Act, 1920, in behalf of any of the parties named in said complaint, or in said Appendix A, on account of any shipments of livestock loaded or unloaded at Union Stock Yards, Chicago, during the period of Federal Control of Railroads.

16. For answer to paragraph 17 of said petition, this defendant admits that some but not all of the parties named as plaintiffs in this suit were named in the complaint in said docket 12614, and described as members of the Chicago Live Stock Exchange, but denies that the said parties named as plaintiffs herein or any or either of them were named in the said Appendix A attached to said complaint, and denies that the parties named as plaintiffs herein or any or either of them were parties to said complaint or presented any claim therein as against the Director General of Railroads or the agent appointed pursuant to Section 206-A, Transportation Act 1920.

This defendant admits that a public hearing was had on said complaint at which evidence was taken and heard and further hearing in said docket 9977, and after said hearing the Interstate Commerce Commission issued its consolidated decision and report in said causes, which report is published

and reported in 100 I. C. C. 266, and referred to in said paragraph, but no copy thereof is attached thereto.

Further answering said paragraph 17, this defendant alleges that Paragraph C of Section 206, Transportation Act 1920, required at and prior to the time of the proceedings aforesaid that all claims for reparation on account of any violation of the Interstate Commerce Act in the operation of railroads under Federal Control must be filed with the Interstate Commerce within one year after the termination of Federal Control of Railroads and against the agent designated by the President under said Section 206, designating therein the railroad or system of transportation against which such claim would have been made if such railroad or system had not been under Federal Control at the time the matter complained of took place. And defendant alleges that

133 neither of the parties named as plaintiffs herein filed in said proceeding any claim for reparation with the Interstate Commerce Commission against the said agent on account of assessment and payment of charges for loading or unloading livestock at Union Stock Yards, Chicago, naming and designating the railroad or system of transportation against which complaint would have been brought if such railroad or system of transportation had not been under Federal Control at the time the matter complained of took place, nor did the parties named as plaintiffs herein, or any or either of them, in any manner file or make complaint in said proceeding against the Director General of Railroads or the said agent within one year after the termination of Federal Control of Railroads on account of such matters, in manner and form as required by said Paragraph C, Section 206, Transportation Act 1920, and at the time of the making of said report and for a long time prior thereto, claims of the character involved in said proceeding on behalf of said parties so named as plaintiffs, if any they had, were barred by Section 206, Transportation Act 1920, and the consent of the Government to the filing of such claims with the Interstate Commerce Commission had long prior thereto expired and the Interstate Commerce Commission was by reason thereof without any jurisdiction to consider such claims or to make any findings or orders in respect thereto.

For further answer to said paragraph 17, this defendant states that neither of the parties named as plaintiffs herein presented any claim in said proceedings as against the Director General of Railroads or as against the said agent ap-

pointed by the President, pursuant to Section 206-A, Transportation Act, 1920, designating any specific shipments or any specific railroad or system of transportation prior to the time of the taking of testimony in said matter, nor until more than one year after the termination of Federal Control of Railroads. That during the taking of testimony in said
134 proceeding, and after March 1, 1921, some of the parties named as plaintiffs herein presented testimony in support of alleged claims for reparation on account of the assessment and payment of loading and unloading charges for carload shipments of livestock loaded and unloaded at Union Stock Yards, Chicago, during the period of Federal Control of Railroads, which charges were in such testimony alleged to have been paid by said parties as commissionmen or brokers, charging the amount to and collecting same from shippers, and in which testimony the said parties did designate the railroads or systems of transportation over which the shipments of livestock involved were transported either to or from Union Stock Yards, Chicago, but this defendant alleges that prior to such time the consent of the government to the filing of such claims with the Interstate Commerce Commission had long since expired and at such time the Interstate Commerce Commission was without jurisdiction or authority to consider such claims or to make any order thereon requiring or authorizing the payment of any sum as reparation or damages by the said agent appointed pursuant to said Section 206-A, Transportation Act, 1920, to the said parties so offering such testimony or any or either of them.

This defendant expressly denies that the Interstate Commerce Commission proceeded legally in said hearing or in its report and decision thereon, and alleges that in so far as the said Interstate Commerce Commission attempted to deal with any claim of any or either of the parties named as plaintiffs herein as against the said agent, it acted unlawfully and without jurisdiction and its pretended findings and orders therein are absolutely void.

17. For answer to paragraph 18 of said petition, this defendant denies that plaintiffs submitted to the Inter-
135 state Commerce Commission statements of shipments made by them and upon which any loading or unloading charges were collected by the Director General of Railroads or by this defendant or any predecessor of this defendant as agent appointed pursuant to Section 206, Transportation Act

1920, and this defendant further expressly denies each and every allegation in said paragraph 18 contained.

18. For answer to paragraph 19 of said petition, this defendant admits that on or about the 12th day of December, 1927, the Interstate Commerce Commission entered a pretended order in the proceedings aforesaid, but defendant denies that a copy of said pretended order, marked Exhibit "A", is made a part of said petition or is attached thereto. This defendant further alleges that the Interstate Commerce Commission had theretofore made no findings that the alleged shipments involved in said pretended order had been made by plaintiffs or any or either of them, or that plaintiffs or any or either of them had paid loading or unloading charges on such shipments, nor that plaintiffs or any or either of them had been damaged on account of any charges paid on such shipments.

19. For answer to paragraph 20 of said petition, this defendant admits that on or about May 14, 1928, the Interstate Commerce Commission issued a pretended supplemental report and order in said matter, but denies that said pretended supplemental report and order are attached to plaintiff's petition, marked Exhibit "E" or otherwise, and denies that same is made a part thereof.

20. For answer to paragraph 21 of said petition, this defendant admits that on or about November 27, 1928, the Interstate Commerce Commission issued a further pre-
136 tended order in said matter, but denies that same is attached to said petition, marked Exhibit "F" or otherwise, and denies that same is made a part thereof.

21. For answer to paragraph 22 of said petition, this defendant admits that the said pretended reports and said pretended orders were served on this defendant, and this defendant has refused and still refuses to pay any sum or amount to plaintiffs or any or either of them, but this defendant expressly denies that any amount is owing to plaintiffs or any or either of them from this defendant on account of said matters and alleges that said pretended reports and orders were entered by the said Interstate Commerce Commission without jurisdiction, and same and each of them are wholly without legal force or effect and void.

22. Further answering said petition, this defendant alleges that all of the alleged and pretended findings, reports and orders set forth and relied on by plaintiffs in said petition

are and were without support in the evidence offered and submitted in the said several hearings and are contrary to law, and the said Interstate Commerce Commission was at all times without jurisdiction, power or authority to make any award in favor of plaintiffs or any or either of them and against the Director General of Railroads or against the agent appointed by the President, pursuant to Section 206, Transportation Act, 1920, on account of the assessment and payment of loading and unloading charges on carload shipments of livestock delivered to or received at Union Stock Yards, Chicago, during the period of Federal Control by carriers under Federal Control, and the said pretended awards sued on in this cause and the pretended findings
137 relied on in support thereof are void and wholly without legal effect.

23. Further answering said petition, this defendant alleges that no complaint or claim for reparation on account of the payments of charges for loading and unloading livestock at Union Stock Yards, Chicago, during the period of Federal Control was filed by plaintiffs or any or either of them with the Interstate Commerce Commission and against the Director General of Railroads, prior to the termination of Federal Control of Railroads.

24. Further answering said petition, this defendant alleges that Section 206, Transportation Act 1920, in paragraph C thereof, provides:

"Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal Control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission, within one year after the termination of Federal control, against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place."

By virtue of the foregoing, the Interstate Commerce Commission was given jurisdiction to hear and determine such

complaints when so filed and not otherwise. That no complaint praying for reparation on account of the payment of charges for loading and unloading livestock at Union Stock Yards, Chicago, or for any violation of the Interstate Commerce Act in connection with the transportation of live-
138 stock to or from the Union Stock Yards, Chicago, during the period of Federal Control of Railroads was filed by plaintiffs or any or either of them with the Interstate Commerce Commission within or one year after the termination of Federal Control of railroads and against the agent designated by the President, as provided in the said act, and naming the railroads or systems of transportation against which complaint on account thereof would have been brought if such railroads or systems of transportation had not been under Federal Control. Nor did plaintiffs or any or either of them file a complaint in reference to such matters as required by said Act at any time and all claims of plaintiffs and each and every of them, if any they had, on account of payment of such charges became barred at the expiration of one year from the termination of Federal Control, to-wit, at 12:01 a. m., March 1, 1921, and the consent of the United States to the bringing or prosecuting of complaints on account of such matters expired at said time, and the Interstate Commerce Commission had and could acquire no jurisdiction to entertain a complaint or a claim in reference to said matters, filed or presented thereafter, or to make any award thereon. And by reason thereof, and of the foregoing, the pretended findings and awards relied on by the plaintiffs and set forth and referred to in their petition were wholly void and without legal force or effect.

25. Further answering said petition, this defendant alleges that plaintiffs did not pay or bear the loading and unloading charges of which complaint is made herein, and plaintiffs did not suffer any damage by reason of the assessment and payment thereof. Said plaintiffs were related to the shipments involved merely as commissionmen or brokers
138 and such charges if any paid by plaintiffs were paid from monies of the various owners of the livestock involved and as agents of such owners and in accounting to such owners for the proceeds of the sales of the various shipments with reference to which such charges were paid, plaintiffs charged such amount to the said several owners who in fact

paid the same and were the persons who bore such charges and the persons damaged thereby, if damage to anyone resulted therefrom.

This defendant further alleges that the plaintiffs are not the real parties in interest in respect to the matters herein sued on and have no title to the claims for reparation, if any exist, on account of the payment of such charges, and are without such interest, right, capacity, or authority in the premises as will entitle them to maintain this suit.

26. Further answering said petition, this defendant alleges that the loading and unloading of livestock at Union Stock Yards, Chicago, transported thereto or therefrom by railroads under Federal Control, was during the entire period of Federal Control of railroads a duty of the shippers of such stock or of Union Stock Yards & Transit Company, or both, and expressly denies that the loading and unloading of livestock at said place transported thereto or therefrom by railroads under Federal Control was a duty of the Director General of Railroads, or of carriers under Federal Control.

This defendant further alleges that no charge for loading or unloading livestock at Union Stock Yards, Chicago, was made by any carrier under Federal Control in its tariffs or otherwise during said period, and the charges provided in the tariffs of such carriers for transportation of livestock to and from said Union Stock Yards, Chicago, did not include the loading or unloading of such livestock at such place, but provided only for the line haul of such livestock, but such
140 tariffs did provide for absorbing the sum of twenty-five cents for unloading and the sum of fifty cents for loading each car of livestock transported on the lines of carriers under Federal Control to or from such Union Stock Yards, and such amounts were paid to the Union Stock Yard & Transit Company by the Director General of Railroads, pursuant to such tariffs for all carloads of livestock so transported during the period of Federal Control of Railroads.

27. This defendant hereby refers to the reports and decisions of the Interstate Commerce Commission, referred to in the petition herein and published in 52 I. C. C. 209, 58 I. C. C. 164, and 100 I. C. C. 266, and makes same as published in said reports respectively a part hereof as fully and completely as if reiterated and set out herein verbatim and in full.

Wherefore, having fully answered this defendant prays

that the plaintiffs' petition be dismissed as to him, and for costs.

(Signed) EDGAR R. HART
Edgar R. Hart,
226 West Jackson Boulevard,
Chicago, Illinois
(Signed) SIDNEY F. ANDREWS
Sidney F. Andrews,
Hurley-Wright Building,
Washington, D. C.
(Signed) A. A. McLAUGHLIN,
A. A. McLaughlin,
1115 Bankers Trust Building,
Des Moines, Iowa.
Attorneys for Andrew W. Mellon, Director General of Railroads, as Agent under Section 206, *Transportation Act*, 1920,
Defendant.

141 And afterwards, to wit, on the 26th day of October 1929, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge, appears the following entry, to wit:

142 • • (Caption) • •

Saturday, October 26, 1929.

Present Honorable Charles E. Woodward Judge of said Court.

On agreement of the parties to this suit now here made in open Court It Is Ordered that this suit be and the same is hereby set for trial January 6, A. D. 1930.

143 And afterwards, to wit, on the 6th day of January 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge, appears the following entry, to wit:

144 • • (Caption) • •

Monday, January 6, 1930.

Present: Honorable Charles E. Woodward Judge of said Court.

On motion It Is Ordered by the Court that this cause be and the same is hereby continued for trial at the head of the trial call to January 7, 1930.

145 And afterwards, to wit, on the 7th day of January, 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

146 • • (Caption) • •

Tuesday, January 7, 1930.

Present: Honorable Charles E. Woodward, Judge of Said Court.

This cause being called for trial come the parties to this suit by their attorneys respectively and issues being joined herein It Is Ordered that a Jury come whereupon come the Jurors of a Jury of good and lawful men to wit:

Walter B. Hull	J. H. Bradford
Edward W. Blunke	W. E. Williams
Fred Kihm	Clarence W. Anderson
Richard Cooper	John D. Haines
Louis Solor	Roy Leonard
L. J. Maynard	Frank Meisinger

who are duly elected tried and sworn well and truly to try the issues joined herein and a true verdict render according to the law and the evidence and on motion of plaintiffs' attorneys It Is Ordered that this cause be and the same is hereby dismissed as to the defendants William W. Wheelock and William G. Bierd, Receivers of the Chicago and Alton Railroad Company, and the usual hour of adjournment having arrived It Is Ordered that said Jury be permitted to separate until 10 A. M. January 8 A. D. 1930.

147 And afterwards, to wit, on the 8th day of January 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit: Ente 19

148 * * (Caption) * *

Wednesday, January 8, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

This day again come the parties to this suit by their attorneys respectively and the Jury heretofore empaneled herein for the trial of said cause also come and thereupon at close of the plaintiffs' evidence plaintiffs rest with a reservation to take up the question of attorneys fees and the usual hour of adjournment having arrived It Is Ordered that said Jury be permitted to separate until 10:30 A. M. January 9 A. D. 1930.

149 And on, to wit, the 9th day of January, 1930 came the defendants by their attorneys and filed in the Clerk's office of said Court a certain Motion for a Directed Verdict in words and figures following, to wit: File 19

150 * * (Caption) * *

MOTION OF ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS AS AGENT, FOR A DIRECTED VERDICT.

All parties having rested and the evidence being closed, defendant, Andrew W. Mellon, Director General of Railroads as Agent, etc., now moves the Court to direct the jury to return a verdict in his favor and against all of the plaintiffs, and urges as grounds therefor the following:

1. The evidence is insufficient to support or sustain the order of the Interstate Commerce Commission sued on in this case.

2. The evidence in this case shows that the consent of

Congress for the bringing and filing of complaints before the Interstate Commerce Commission and against the agent appointed by the President, pursuant to Section 206-A, Transportation Act 1920, was not complied with, and that the Interstate Commerce Commission acquired and had no jurisdiction to make the order and award sued on as against this defendant.

3. The evidence in this case shows that the Union Stockyards & Transit Company was, during all of the time complained of in this suit, a common carrier, and that it received the livestock, for the unloading of which the charges in controversy were assessed and collected, from the railroads being operated by the Director General of Railroads, under
151 Federal Control, as a connecting carrier; that it unloaded such livestock as such connecting carrier and delivered same after unloading to the consignees entitled to receive the same; that the charge collected for such unloading was provided for in its tariffs on file with the Interstate Commerce Commission and the said Union Stockyards & Transit Company collected said charges and received the benefits thereof.

4. The evidence before the Interstate Commerce Commission and in this case was and is insufficient to support the finding of the Commission that the collection of separate charges from the shippers for unloading and loading live stock in addition to the line haul rates on live stock, was an unlawful and unreasonable practice, but on the contrary such evidence shows the collection of such separate charges was both reasonable and lawful and the duty of the Union Stockyards & Transit Company.

5. The loading and unloading of live stock in carload lots was a part of the transportation of said live stock from point of origin to destination and was a service for which the shipper or consignee was obliged to compensate the carrier performing the same. Such service was performed by the Union Stockyards & Transit Company and the tariffs of the linehaul carriers delivering the said live stock to the Union Stockyards & Transit Company provided for absorbing or paying 25c for unloading and 50c for loading each carload of live stock at the Union Stockyards, Chicago. To the extent the charges of the said Union Stockyards & Transit Company for performing such service were not within the absorption provisions for the linehaul carriers, same were properly collectible from the shipper or consignee and being in a lawfully

published tariff the Union Stockyards & Transit Company was bound to make such collection.

152 6. The evidence in this case is insufficient to show that the Director General of Railroads collected or received any of the money paid to the Union Stockyards & Transit Company on account of the loading and unloading and unloading charge in dispute.

7. The evidence in this case is insufficient to show the amount, if anything, paid on account of the loading and unloading charges in controversy, received by the Director General.

8. The evidence in this case is insufficient to show the amount of liability if any existing in behalf of any plaintiff in this suit and against defendant, Andrew W. Mellon, Director General of Railroads as agent.

9. The evidence in this case shows that the evidence offered, introduced and received in the various hearings before the Interstate Commerce Commission in the proceedings in which the order sued on was made was insufficient to justify or support such order.

10. The evidence offered, introduced and received before the Interstate Commerce Commission, in the proceedings in which the order sued on was entered, was insufficient to support the Commission's finding and conclusion that the loading and unloading of livestock at the Union Stockyards, Chicago, was a duty that should be performed by the carriers without making a separate charge therefor.

11. The evidence in this case shows affirmatively and conclusively that plaintiffs received the livestock, on account of which the charges involved in this suit were assessed and collected, as commissionmen or agents of the various persons, firms and corporations who shipped the same, as consignees, for purposes of sale, in consideration of the payment of a commission and the said plaintiffs sold said livestock as such commissionmen and agents of the shippers and paid the charges in controversy, from the shippers' own funds, be-

153 fore remitting the net proceeds of the sale thereof and shows that the said plaintiffs do not have such interest or right as will entitle them or any of them to maintain suit to recover such charges in any event.

12. The evidence is insufficient to show such interest in plaintiffs or any of them as will permit of recovery herein on the part of any plaintiff as against this defendant.

13. Under all the evidence in this case, the fact of the

agent of the linehaul carriers inserting the unloading charge in the waybill stub, which constituted the bill presented by the Union Stockyards & Transit Company to the consignees, covering freight and terminal charges, will not justify a finding that the Director General participated in the collection of such charges or that he received the benefit of the collection thereof, nor will such fact justify a verdict against this defendant.

14. The charge complained of in this suit, while the tariff of the Union Stockyards & Transit Company providing therefor, was in effect and to the extent that the tariffs of the linehaul carriers made no provision for its absorption, was a charge the Union Stockyards & Transit Company was bound to collect from the consignor or consignee of the livestock involved and the fact that the agent of the linehaul carriers, in making up the bill to be presented by the Union Stockyards & Transit Company for freight and terminal charges, inserted or included such charge as a separate item therein will not justify or sustain a verdict against this defendant.

15. The evidence is insufficient to show a liability on the part of this defendant in favor of any plaintiff in this suit in any amount.

16. The evidence is insufficient to show that plaintiffs or any of them have been damaged in any amount by the collection of the charges in controversy.

17. The evidence affirmatively shows that plaintiffs and each of them are without any right or title to any claim that may have arisen on account of the collection of the
154 charges in controversy and are without any right or authority to maintain this suit and were without any right or authority to make complaint in their own names before the Interstate Commerce Commission on account of the collection of such charges, and the awarding of reparation to plaintiffs by the Interstate Commerce Commission was erroneous and contrary to law.

18. The evidence is insufficient to show or support the finding of the Interstate Commerce Commission that the docks and chutes of the Union Stockyards & Transit Company are or were the terminals of the railroad carriers but, on the contrary, affirmatively shows that such docks and chutes were the property of the Union Stockyards & Transit Company, used, maintained and operated by it in the performance of its duties and services as a common carrier of livestock.

19. The evidence in this case affirmatively shows that the

docks, chutes and loading pens and stockyards used, maintained and operated by the Union Stockyards & Transit Company, constituted the property devoted to public use and employed in conducting the business of the Union Stockyards & Transit Company, as a common carrier and as a connecting carrier of the railroad carriers transporting livestock thereto and therefrom, and same were not the terminals of such railroad carriers and were no part of the facilities of such railroad carriers, and the services performed in the operation and use thereof was not a service included in the transportation furnished by such railroad carriers, under and pursuant to their tariffs on file with the Interstate Commerce Commission.

20. The evidence shows that compensation for the service of loading and unloading livestock transported by the railroad carriers involved in this suit, to the Union Stockyards, Chicago, was included in the linehaul rate and terminal charge in the amount of 50c for loading and 25c for unloading each carload of such livestock, and the additional charge of 25c contained in the tariff of the Union Stockyards & Transit
155 Company effective May 21, 1917, was not included therein.

21. The place of delivery of the livestock in controversy was off of the lines of the railroad carriers operated by the Director General of Railroads under Federal Control and involved in this suit, and the service of loading and unloading such livestock was performed by a common carrier on whose property delivery was required to be made. There is no evidence in this case justifying a finding that the said railroad carriers should assume and pay any portion of such common carrier's charges, for the services it performed, in excess of the amounts provided for in their tariffs on file with the Interstate Commerce Commission.

22. The tariffs and livestock contracts of the railroad carriers, operated by the Director General of Railroads under Federal Control, and involved in this suit, provided that the rates were made in respect to the duty of the shipper or consignee to load and unload the same. The shippers and consignee were relieved of such burden at Union Stockyards, Chicago, in the sum of 50c for loading and 25c for unloading each carload of livestock, by reason of the absorption provisions of the railroad carriers tariffs to that effect, but the remainder of such burden rested and remained on the shipper and consignee.

23. The Interstate Commerce Commission did not acquire

or have jurisdiction to enter the order sued on against this defendant, and the pretended order furnishes no basis for a recovery against this defendant in this suit.

24. Under all of the evidence introduced in this cause, no verdict against this defendant, if returned by the jury, could be permitted to stand but must be set aside by the Court.

156 In presenting this motion, defendant reserves the right, in the event this motion be denied, to have this case submitted to the jury upon the special charges requested by him, and upon such other legal and proper charges as the court may give.

EDGAR R. HART
SIDNEY F. ANDREWS
A. A. MCLAUGHLIN
Attorneys for Defendant, Andrew W. Mellon, Director General of Railroads as Agent.

n. 9, 157 And on, to wit, the 9th day of January, 1930 came the defendants by their attorneys and filed in the Clerk's office of said Court a certain Motion of Defendant, Union Stock Yard & Transit Company For a Directed Verdict in words and figures following, to wit:

158 * * (Caption) * *

MOTION OF DEFENDANT, UNION STOCK YARD & TRANSIT COMPANY, FOR A DIRECTED VERDICT.

All parties having rested and the evidence being closed, defendant Union Stock Yard & Transit Company of Chicago now moves the Court to direct the jury to return a verdict in its favor and against all of the plaintiffs, on the following grounds:

1. The complaint in Docket 9977 before the Interstate Commerce Commission did not pray for the payment of reparation by this defendant to any of the plaintiffs herein, and the evidence is insufficient to sustain any award of reparation against said defendant and to said plaintiffs in Docket 12614 before the said Commission.

2. Said defendant in any event is not liable to plaintiffs upon any shipments which moved prior to February 25, 1919,

and the record is insufficient to sustain any award against said defendant and in favor of plaintiffs on shipments moving subsequent to said date.

3. The award and order of the Interstate Commerce Commission sued on in this case is void because the Interstate
159 Commerce Commission in making such award and order went outside the record made before it and considered substantial evidence not in said record.

4. The evidence is insufficient to support or sustain the award and order of the Interstate Commerce Commission sued on in this case.

5. The evidence in this case shows that said defendant in loading and unloading live stock at the Union Stock Yard, Chicago, Illinois, during all of the time involved in this case was not performing a common carrier service, and that with respect to such service the Interstate Commerce Commission had no jurisdiction.

6. The evidence in this case shows that all of the charges referred to in the award and order of the Interstate Commerce Commission sued on and involved in this case were not paid to this defendant, but to the Director General of Railroads, and that the only charges received by said defendant during the period involved in this case for loading and unloading live stock were charges authorized by this defendant's tariffs then on file with the Interstate Commerce Commission, and which had been approved by said Commission.

7. The evidence in this case is insufficient to show the amount, if any, paid on account of the loading and unloading charges in controversy and received by this defendant.

8. The evidence in this case is insufficient to show the amount of the liability, if any, existing in behalf of any plaintiff in this suit and against this defendant.

9. The evidence in this case shows that the evidence offered and received in the various hearings before the Interstate Commerce Commission in the proceedings in which the order and award sued on was made, was insufficient to justify or support such order.

160 10. The order and award of the Interstate Commerce Commission sued on herein operates to confiscate the property of this defendant, in violation of its constitutional rights.

11. The order and award of the Interstate Commerce Commission sued on herein is contradictory to and in violation of the previous finding of the Commission that the duty to load

and unload live stock at the Union Stock Yards, Chicago, rested upon the carriers hauling such stock to and from said market, and has the effect of imposing such duty upon this defendant.

12. The evidence in this case shows affirmatively that the plaintiffs in this suit do not have any interest or right sufficient to entitled them or any of them to maintain this suit or any suit to recover the charges sued for herein.

13. The evidence is insufficient to show a liability on the part of this defendant to any plaintiff in this suit in any amount.

14. The evidence is insufficient to show that plaintiffs or any of them have been damaged in any amount by the collection of the charges herein sued for.

15. The evidence shows that the plaintiffs and each of them do not have any right or title to any claim that may have arisen on account of the collection of the charges in controversy, and are without any right or authority to maintain this suit, and were without any right or authority to make complaint in their own names before the Interstate Commerce Commission on account of the collection of such charges, and the awarding of reparation to plaintiffs by said Commission was erroneous and contrary to law.

16. The evidence is insufficient to show or support the finding of the Interstate Commerce Commission that the docks and chutes of this defendant are or were its terminals used in the transportation of live stock.

161 17. The Interstate Commerce Commission did not acquire or have jurisdiction to enter the order sued on against this defendant, and said order furnishes no basis for a recovery against this defendant in this suit.

18. Under all of the evidence introduced in this cause no verdict against this defendant, if returned by the jury, could be permitted to stand, but must be set aside by the court.

In presenting this motion this defendant reserves the right, in the event this motion be denied, to have this case submitted to the jury upon special charges requested by it, and upon such other legal and proper charges as the Court may give.

WINSTON, STRAWN & SHAW
Attorneys for Defendant Union Stock Yard & Transit Company of Chicago.

162 And afterwards, to wit, on the 9th day of January 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge, appears the following entry, to wit: Enter 193

163 * * (Caption) * *

Thursday, January 9, 1930.

Present: Honorable Charles E. Woodward Judge of said Court.

This day again come the parties to this suit by their attorneys respectively and the Jury heretofore empaneled herein for the trial of said cause also come and thereupon at close of all the evidence It Is Ordered by the Court that the said Jury be permitted to separate until 2 P. M. January 13, A. D. 1930 whereupon the defendant Andrew W. Mellon Director General of Railroads as Agent of the President enters herein his motion for a directed verdict and thereupon the defendant Union Stock Yard & Transit Company by its attorney enters herein its motion for a directed verdict and after having heard the arguments of counsel It Is Ordered that said cause be and the same is hereby continued for further arguments to 10 A. M. January 10 A. D. 1930.

164 And afterwards, to wit, on the 10th day of January 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge appears the following entry, to wit:

165 * * (Caption) * *

Friday, January 10, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

This day again come the parties to this suit by their attorneys respectively and thereupon this cause coming on further to be heard upon the defendants' motion for a directed ver-

dict and the Court having heard arguments of counsel in part It Is Ordered that the defendants' motion for a directed verdict be and the same is hereby continued for further hearing to January 13 A. D. 1930.

166 And afterwards, to wit, on the 13th day of January, 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge, appears the following entry, to wit:

167 * * (Caption) * * *

Monday, January 13, 1930.

Present: Honorable Charles E. Woodward Judge of said Court.

This day again come the parties to this suit by their atorneys respectively and thereupon this cause coming on further to be heard upon the defendants' motion for a directed verdict and the Court having heard the arguments of counsel in part It Is Ordered that said cause be and the same is hereby continued for further hearing to January 14, 1930.

168 And afterwards, to wit, on the 14th day of January 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge, appears the following entry, to wit:

169 * * (Caption) * *

Tuesday, January 14, A. D. 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

This day again come the parties to this suit by their attorneys respectively and thereupon this cause coming on further to be heard upon the defendants' motion for a directed verdict and after arguments of counsel said motion is continued for further hearing to January 15 A. D. 1930.

170 And afterwards, to wit, on the 15th day of January 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

171 * * (Caption) * *

Wednesday, January 15, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

This day again come the parties by their attorneys respectively and the Jury heretofore empaneled herein for the trial of said cause also come and thereupon this cause coming on further to be heard on the defendants' motion for a directed verdict and the Court having heard the arguments of counsel in part It Is Ordered that said motion be and the same is hereby continued to January 16, A. D. 1930.

172 And afterwards, to wit, on the 16th day of January 1930, being one of the days of regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

173 * * (Caption) * *

Thursday, January 16, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

This day again come the parties by their attorneys respectively and thereupon this cause coming on further to be heard upon the defendants' motion for a directed verdict and the Court having heard the arguments of counsel in part It Is Ordered that said motion be and the same is hereby continued to January 17, A. D. 1930.

174 And afterwards, to wit, on the 17th day of January 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge, appears the following entry, to wit:

175 * * (Caption) * *

Friday, January 17, 1930

Present: Honorable Charles E. Woodward, Judge of said Court.

This cause coming on further to be heard upon the defendants' motion for a directed verdict and after arguments of counsel said motion is taken under advisement.

176 And afterwards, to wit, on the 20th day of January 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge(appears the following entry, to wit:

177 * * (Caption) * *

Monday, January 20, 1930.

Present: Honorable Charles E. Woodward Judge of said Court.

This day again come the parties to this suit by their attorneys respectively and the Jury heretofore empaneled herein for the trial of said cause also come and the usual hour of adjournment having arrived It Is Ordered that said Jury be permitted to separate until 2 P. M. January 23, A. D. 1930.

178 And afterwards, to wit, on the 23rd day of January, 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge, appears the following entry, to wit:

179 * * (Caption) * *

Thursday, January 23, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

This day again come the parties to this suit by their attorneys respectively and the Jury heretofore empaneled herein for the trial of said cause also come and the usual hour of adjournment having arrived It Is Ordered that said Jury be permitted to separate until 2 P. M. January 27, A. D. 1930.

180 And afterwards, to wit, on the 27th day of January 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof in said entitled cause, before the Honorable Charles E. Woodward District Judge, appears the following entry, to wit:

181 * * (Caption) * *

Monday, January 27, 1930.

Present Honorable Charles E. Woodward, Judge of said Court.

This day again come the parties to this suit by their attorneys respectively and the Jury heretofore empaneled herein for the trial of said cause also come thereupon It Is Ordered by the Court that the defendants' motion for a directed verdict be and the same is hereby continued to January 28, A. D. 1930.

It Is Ordered that the Jury be permitted to separate until 10 A. M. January 28, A. D. 1930.

182 And on, to wit, the 28th day of January, 1930 there was filed in the Clerk's office of said Court a certain Opinion in words and figures following, to wit:

Jan. 28, 183 * * (Caption) * *

On motion for a directed verdict.

OPINION OF JUDGE WOODWARD DELIVERED AND FILED IN U. S. DISTRICT COURT JAN. 28, 1930.

WOODWARD, *District Judge:*

Plaintiffs, one hundred three in number, members of The Chicago Live Stock Exchange, bring this suit against Union Stock Yards & Transit Company, a corporation, Andrew Mellon, Director General of Railroads as agent for the President, under section 206 of the Transportation Act of 1920, (49 USCA 74) against whom actions at law may be brought on causes of action arising out of the possession, use or operation by the President of the railroads and systems of transportation, of the A. T. & S. F. Ry. Co. and a number of other railroad companies, all of which were operated and controlled by the predecessors in office of the defendant, Andrew Mellon, as Director General, during the period of Federal control of railroads from December 28, 1917, to March 1, 1920. This suit is brought under Section 16 of the Act to Regulate Commerce (49 USCA 16) to recover from the defendants jointly $140,001.25, with interest thereon at six per cent per annum, awarded to plaintiffs in a reparations order entered by the Interstate Commerce Commission on December 12, 1927, which sum has not been paid. The Union Stock Yard & Transit Company and the Director General filed separate answers.
184 This controversy relates only to the period of Federal control.

The plaintiffs, on the trial, offered several reports and findings of the Interstate Commerce Commission, the reparations order based upon its findings—some matters stipulated by the parties and some oral testimony. The defendants offered the records, docket-entries, files and papers, of the Interstate Commerce Commission in the several proceedings alluded to, together with the transcripts of evidence taken on the several hearings before the commission as well as certain matters stipulated by the parties.

At the conclusion of all the evidence the Union Stock Yard & Transit Company and the Director General, separately, made motions to instruct the jury to return a verdict in favor

of the defendants, setting up, in the respective motions, the reasons why such motions, respectively, should be allowed.

The court is now ruling on such motions.

The Union Stock Yard & Transit Company is an Illinois corporation created by special act of February 13, 1865. It maintains and operates stock yards in Chicago, Illinois. It maintains and owns platforms, chutes and pens for the loading and unloading of live stock. Railroad cars are delivered by the transportation companies to its platforms for loading and unloading live stock. ~~*The physical acts of loading all live stock into railroad cars, and of unloading all live stock from railroad cars during the period of Federal control, including all live stock involved in this suit, were performed by employees of the Union Stock Yards & Transit Company.*~~ The property of the Union Stock Yard & Transit Company was not taken over or operated by the Government during the period of Federal control of railroads.

185

Prior to May 21, 1917, there was in force a tariff of the Union Stock Yard & Transit Company published and filed with the Interstate Commerce Commission whereby a charge of 25 cents for loading and 50 cents for loading each car of live stock was made by the Union Stock Yard & Transit Company on all cars of live stock unloaded and loaded at the Union Stock Yards.

This charge was absorbed by the railroads under what was known as the L. A. Lowrey Tariff. On May 21, 1917, the Union Stock Yard & Transit Company increased its charges to 50 cents for unloading and 75 cents for loading each car of live stock. Controversy immediately arose with the railroads as to the absorption of this extra 25 cents. Effective September 1, 1917 the Union Stock Yard & Transit Company filed its tariff cancelling this additional charge. However, the Interstate Commerce Commission suspended from time to time the cancellation, with the result that the higher rate was compelled to be collected. By reason of protests filed as to this tariff, it was set down for hearing under Investigation and Suspension Docket No. 1118.

186

On November 17, 1917, the Chicago Live Stock Exchange, a corporation, its members consisting of live stock commission merchants, and owners and raisers of cattle engaged in buying, selling, receiving and shipping live stock at the Union Stock Yards, acting on behalf of its members severally and collectively, filed with the Interstate Commerce Commission its complaint against the further maintenance of

the charge of 50 cents for unloading and 75 cents for loading each car of live stock at the Union Stock Yards. This complaint bears Docket No. 9977.

The complaint averred in substance that the charge of 50 cents for unloading and 75 cents for loading each car of live stock at the Union Stock Yards was unjust and unreasonable and in violation of the Act to Regulate Commerce. It prayed, among other things, that the defendant carriers be ordered to cease and desist making such charges and to put in force reasonable maximum rates and charges.

> "To order the defendant carriers to pay to the complainant's members and patrons by way of reparation for the unlawful charges * * * the sum of 25 cents per car * * * as an award of damages * * *".

The complainant did not name, except by way of description, any of the plaintiffs in this suit.

This complaint was consolidated with Investigation and Suspension Docket No. 1118. Answers were filed and a hearing was had on the cases as consolidated.

On February 11, 1919 the commission rendered its decision (52 I. C. C. 209) dismissing the complaint in Docket No. 9977 and discontinuing its investigation in Investigation and Suspension Docket No. 1118.

187

On March 31, 1919, The Chicago Live Stock Exchange and the Union Stock Yard & Transit Company filed petitions for a rehearing, which were allowed and the proceedings were reopened.

On July 15, 1920, the Commission rendered its decision, reported in 58 I. C. C. 1640. The findings of the Commission contained, among other things, the following finding:

> "We further find that shippers who paid and bore charges for unloading and loading live stock at the stockyards in addition to the rates to and from the stockyards, and who are parties of record herein, have been damaged in the amount of such charges and are entitled to reparation, with interest from the date of such payment. The exact amount of reparation due each shipper cannot be determined on this record, and they should comply with Rule V of the Rules of Practice."

Because of the delay encountered in adjusting the matter of reparation and with a view to meeting objections raised by counsel, a new complaint was filed with the Interstate Commerce Commission on February 25, 1921, and was known as Docket No. 12614.

In this complaint the Chicago Live Stock Commission is named the complainant. By paragraph I it states, among other things, that

"this complaint is brought on behalf of the members of complainant association, severally and collectively, and no behalf of the owners, consignors and consignees of shipments of said live stock to and from said Union Stock Yards."

188 By paragraph IV it names the individuals, firms and corporations who are its members, the paragraph concluding:

"That said above-named individuals, firms, copartnerships and corporations on their own behalf, as consignees of inbound shipments or as consignors of outbound shipments, or as factors or agents for the consignors of inbound shipments or as factors or agents for the consignees of outbound shipments, paid to the defendants each and all of the charges complained of as unlawful, as shown by their books and records, and charged said amounts of payments for loading and unloading in their accounts sales against the consignors and consignees."

A printed list containing many thousand names of persons, firms and corporations alleged to have shipped live stock to, or to have received live stock at, or to have shipped live stock from the Union Stock Yards during the time covered by the complaint was filed therewith and described therein as Appendix A.

The complaint names as defendants the Union Stock Yard & Transit Company, the Director General, and many railroad companies.

The issues in this complaint are in substauce the same as those in No. 9977.

The complainant prays, among other things, that

"Said defendants be required to pay to the individual firms or corporations, members of the Chicago Live Stock Exchange as factors and agents, for the use and benefit of the individuals, firms and corporations shown in Appendix A, or directly to said parties shown in Appendix A, by way of reparation for unlawful and unreasonable charges * * * *."

189 Extensive hearings were had, the case being consolidated with Docket No. 9977.

On June 2, 1925, the commission rendered its decision (100 I. C. C. 266).

The commission, in its report (100 I. C. C. 266) refer to

its decision in No. 9977 (58 I. C. C. 164) and review briefly what had transpired since that decision and say:

> "In the meantime, however, there had been raised by counsel for the Director General of Railroads, as agent, and the Union Stock Yard & Transit Company, hereinafter called the stockyard company, questions as to who were the parties of record entitled to reparation, and which among the defendants should satisfy any order of reparation which might be entered."

As to who are the complainants the Commission say on pages 267-268:

> "The complaint in No. 9977, filed November 17, 1917, brought in issue interstate shipments and named as complainant only The Chicago Live Stock Exchange. While the latter was described in the body of the complaint as "an association of persons, firms and corporations" whose membership consisted of "livestock commission merchants, owners and raisers of cattle engaged in the buying, selling, receiving and shipping of livestock in interstate and foreign commerce," and it was recited "that the said association represents every shipper and receiver of livestock at every station in the United States shipping to and from the public livestock market located at the Union Stock Yards in the City of Chicago, Illinois," hereinafter referred to as the stockyards, none of the parties so described were specifically named in the complaint. On June 16, 1919, counsel for complainant transmitted to us, apparently without service on the defendants, "a
> 190 printed list of farmers, stock raisers, and shippers throughout the country who have made shipments to and from the Chicago market during the past two years and who have paid the charges under investigation in this proceeding." However, the complainants and their shipments were identified by reason of the fact that none but members of the exchange were permitted to do business through the stockyards, participant in the transportation, where all such members were known and where their shipments were matters of record.
>
> "Because of the delay encountered in adjusting the matter of reparation, and with a view to meeting the various questions raised by counsel for defendants, the complaint in No. 12614 was filed February 25, 1921. The issues in this complaint are in substance the same as those in No. 9977. In addition it names the Director

General, as agent, as a defendant, alleges violation of the Federal control act, covers shipments within the State of Illinois during the period of Federal control, and also includes interstate shipments from the date of filing the first complaint to the end of the reparation period. It specifically names in the body thereof the 103 members of the complainant association and recites that it is filed in their behalf, severally and collectively, and also as factors and agents on behalf of the owners, consignors, and consigness of the shipments to and from the stockyards. All of the latter parties are listed in an appendix to the complaint."

Again the commission say on pages 269-270:

"Most of the reparation claimed is by the livestock commission merchants, members of the exchange, covering amounts collected from them for the unloading service at the stockyards. They seek reimbursement in their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers and also as factors and agents for and on behalf of the livestock shippers who were the consignors. While it is admitted that in each and every instance the charge which was paid by the commission merchant was subsequently charged back and collected from the consignors, this would not affect the right of the complainant con-
191 signees to awards of reparation. There is a direct and well-established relation between the complaining members of the exchange and their shippers by which the former are fully authorized to present these claims and seek awards of reparation in their own names as factors and agents for such shippers. The commission merchant at the stockyards not only disposes of the shipper's stock at the best market and at such price as he deems best, but is his agent in the payment of freight and related charges, such as feeding, etc., and in the filing of claims for the overcharge and for loss and damage to the stock in transit. Defendants have frequently recognized this relationship by settling loss and damage claims with the commission merchants. The right of factors in their representative capacity to recover reparation in their own names for unlawful and unreasonable charges is settled." *Memphis Freight Bureau* v. *St. L. & S. F. R. R. Co.*, 57 I. C. C. 212.

The commission, therefore, finds, on page 270:

> "We find that the following individuals, co-partnerships, and corporations, parties of record, made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to reparation, as factors and agents for the shippers, with interest from date of payment."

Then follows a list of names of 103 members of the Chicago Live Stock Exchange, who are the plaintiffs in this suit. Commissioners Hall, Esch, Lewis and Cox concurred in the award only as they were constrained thereto by the decision of the majority of the commission in *Missouri Portland Cement Co.* v. *Director General*, 88 I. C. C. 492.

On December 12, 1927, the Commission entered its 192 order finding that the several complainants shown in the table were entitled to reparation from the defendants named in the amounts set opposite their respective names. The table contains awards separately for each of the plaintiffs herein and jointly against the Union Stock Yard & Transit Company and the Director General, specifying, as to the Director General, the amount of reparation due from the carriers severally, and ordered payment thereof on or before January 28, 1928, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of the charges asserted.

The defendants in their motions for a directed verdict, raise many contentions which are common to both defendants and many other contentions which apply separately to the defendant on whose behalf they are made. In the view the court takes of this case it is unnecessary to summarize these various contentions or to discuss them seriatim.

At the outset the contention is made by both defendants in their respective motions to direct a verdict, that these plaintiffs are not the real parties in interest and have no standing to maintain this action.

This contention grows out of the following state of facts: The plaintiffs are 103 commission men, members of the Chicago Live Stock Exchange. The action is brought in their individual names. It is not, and does not purport to be, brought in any representative capacity. The plaintiffs do not sue as assignees as was done in the case of *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, 64 L. Ed. 810.

During the period covered by this action, live stock
193 was consigned by the farmers and producers from various points in this country to the several plaintiffs as consignees at the Union Stock Yards, Chicago, Illinois. The record shows the names of many thousand shippers from hundreds of points of shipment. The plaintiffs received and sold the live stock so consigned to them and collected the proceeds of the sales. From the gross proceeds of the sales the plaintiffs paid the freight, terminal, yardage, unloading and other charges, and, after deducting their commissions, remitted the net amount to the shippers. With the remittance of the net amount of sales the account was closed. As between the plaintiffs and the shippers all such accounts were closed long before the petition for reparation was filed with the Interstate Commerce Commission, and hence long before the institution of this suit.

Among the items deducted from the gross amount of sales was one of twenty-five cents for "unloading" each car of live stock at the Union Stock Yards. The Interstate Commerce Commission has found this charge to be unreasonable and in violation of the act to regulate commerce. It awarded reparation in the sum of $140,001.25 to the plaintiffs in this action. The award not having been paid, this suit is prosecuted.

The question, therefore, is squarely presented as to whether these plaintiffs are the proper parties to maintain this action.

The right to maintain this action is given by statute. The pertinent statutory provision is that found in Section 8 of the Act to regulate commerce (49 USCA 8) which reads as follows:

194 "In case any common carrier * * shall do * * any act, matter or thing * * prohibited or declared unlawful * *, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation."

This statute is an affirmation of the fundamental rule that the person in whom is the lawful right must bring suit. The party damnified is the real party in interest.

The question raised by these motions, and now under consideration, was raised repeatedly in the hearing before the Interstate Commerce Commission in this case. The record before the commission is replete with objections made by the defendants to an award to the plaintiffs on the ground that

the plaintiffs were not the proper parties to whom a reparation award should be made. This contention of the defendants was overruled by the commission. The commission in its order in this case, on June 2, 1925, (100 I. C. C. 266) finds on page 270 as follows:

> "We find that the following individuals, copartnerships, and corporations, parties of record, made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to reparation, as factors and agents for the shippers, with interest from date of payment."

This statement is followed by the names of the plaintiffs in this case. The order of the commission in this case is based upon a prior holding of the commission in the case of *Missouri Portland Cement Co.* v. *Director General,* 88 I. C. C. 492.

195 In the *Missouri Portland Cement Company* case it appeared that carloads of sand were sold f. o. b. complainant's plant at Memphis, Tennessee, and consigned to various consignees at different points. The complainant prepaid the switching charges but admitted that by separate invoices it subsequently collected from the consignees the amount so paid. The complainant contended that it paid and, as between it and the defendant, bore the charges on these shipments and that it is a proper party to bring the proceeding. The commission say:

> "Defendant in reply cites numerous cases in which we have held that the party who actually bore the charges, as such, is the only one entitled to recover. Defendant's statement of our practice in the past is accurate."

Under the above state of facts the commission held that the complainant, the consignor, although the excess charges were actually paid by the consignees, was the party injured and was entitled to recover reparation. The holding in the *Missouri Portland Cement Company case* is explained by the commission in the late case of *California Fruit Exchange* v. *American Railway Express Co.,* 155 I. C. C. 105, at page 107, as follows:

> "Contentions similar to those advanced by defendants here were advanced in *Missouri Portland Cement Co.* v. *Director General,* 88 I. C. C. 492. * * * Therein we found that in determining who is entitled to reparation

it is not necessary to go beyond the first step; that the first step is taken when the freight charges are paid; and that the fact that whoever paid in the first instance suffered no ultimate damage is not of controlling importance. In the absence here of the consignors who finally bore the charges, the inquiry need not extend further than to determine who paid the charges in the first instance."

196 Such holding, as the commission say in its report, reversed a long and uninterrupted series of decisions holding to the contrary. In the case of *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R. R. Co.*, 40 I. C. C. 739, 740, the commission summarize its holdings in the following language:

"The Commission has held without exception that where freight charges are paid by consignees but are charged back to the consignors, the consignees are not entitled to reparation. *Mountain Ice Co.* v. *D. L. & W. R. R. Co.*, 21 I. C. C. 45; *Commercial Club of Omaha* v. *A. & S. R. Ry. Co.*, 27 I. C. C. 302; *Traffic Bureau, Sioux City Commercial Club* v. *A. & S. R. R. Co.*, 37 I. C. C. 353; and other cases.

"In *Hygienic Ice Co.* v. *C. & N. W. Ry. Co.*, 37 I. C. C. 384, the Commission held that the party entitled to reparation is the one who finally bore the freight charges.

"In *Oden & Elliott* v. *S. A. L. Ry.*, 37 I. C. C. 345, the Commission held that the party entitled to recover is he who has either by himself or by another paid and borne the freight charges for the transportation service, and that the ultimate test as to who shall recover is the bearing of the freight charges for the transportation service."

If this case were decided in accordance with the earlier holdings of the commission it is clear that plaintiffs cannot maintain this suit. If, on the other hand, it is to be decided in accordance with the holding of the commission in the *Missouri Portland Cement Company case,* and forty or fifty similar holdings since the decision in that case, then the plaintiffs are the proper parties to maintain this suit.

197 Both parties rely upon the following cases in support of their positions, namely:

Southern Pacific Co. v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 62 L. Ed. 451;

L. & N. R. R. Co. v. *Sloss-Sheffield Co.* 269 U. S. 217.

The previous holdings of the commission were reversed in the *Missouri Portland Cement Company* case by reason of the

commission's interpretation of the decision of the Supreme Court in the case of *Southern Pacific Co.* v. *Darnell Taenzer Lumber Company, supra.*

The *Darnell-Taenzer* case, as the court understands it, did not involve the question as to who were proper parties complainant. The question was, whether, under the facts in that case, the plaintiffs who actually paid the excess charges, suffered any damage. Fully to understand the issues before the court in the *Darnell-Taenzer* case, reference must be had to the same case before the Circuit Court of Appeals and reported in 221 Fed. 890. The contention of the defendant was that the plaintiff had not suffered any damage, although an excess rate was charged, and collected, because

> "The advance in the freight rate has been added to the price paid by the consumer." (p. 892)

The Court say:

> "Defendants insist that this situation conclusively negatives the existence of pecuniary loss by the shippers."

In other words, the defendant contended that the con-
198 sumer, and not the shipper, alone was damaged by the payment of the excessive freight charges. It was to this contention that the Supreme Court, in the *Darnell-Taenzer* case, on page 533, addressed itself when it said:

> "The only question before us is that at which we have hinted; whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to the damages, at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law, and it does not inquire into later events."

Apparently when the court say,

> "That the general tendency of the law, in regard to damages, at least, is not to go beyond the first step,"

and

> "that the law does not inquire into later events,"

the court addressed itself to the contentions of the defendant

that the plaintiff had suffered no loss because of its ability to pass on the excessive freight rates to the consumers. This conception of the language of the court is made clearer by the subsequent language wherein it is said:

> "The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him and from whom the carrier took the sum."

199 As this court interprets the *Darnell-Taenzer* case, it simply holds that the court, in a suit on a reparation award, will not inquire into the commercial effect of the payment of an illegal freight rate. What the court refer to, in the *Darnell-Taenzer* case, is the economic incidence of the payment of the excessive charge. Who, in an economic sense, ultimately bears the payment is a matter into which the court will not inquire. The economic bearer of the burden, be he purchaser or consumer, is not a proper party plaintiff. Neither can the defendant absolve itself from the payment of damages because, in an economic sense, the plaintiff might add the excess price to his product and itself impose the burden or injury upon the consumer. From the opinion in the *Darnell-Taenzer* case it is clear that the plaintiffs there were the ones who actually paid the money and who, in the first instance, bore the burden. The *Darnell-Taenzer* case is, in the view of this court, not authority for either party to this cause. If it be considered an authority, it is in favor of the defendants.

However, the *Sloss-Sheffield* case, *supra,* is in point. In this case it appeared that the plaintiff was the consignor of all the shipments on which it was awarded reparations. The freight charges were not prepaid. The pig-iron embraced in the shipments was sold at a delivered price f.o.b. destination. At the various times when the pig-iron was delivered to the purchaser at the point of destination, the purchaser paid the freight bill on the delivery of the shipment and remitted to the plaintiff the amount of the bill for the delivered price
200 less the freight charges at the rate specified in the contract of sale.

The consignor was the plaintiff in the action. It was objected that the *Sloss-Sheffield Company* could not recover because it was not damaged by the excessive freight charges. With respect to that contention the court say, on page 235:

> "The Commission and the District Court found that the Sloss-Sheffield Company bore the transportation

charges and was damaged to the extent of the difference between the charges paid and those that would have accrued at the rates found reasonable. Both tribunals found further that all the iron was sold f. o. b. destination; that it was shipped to purchasers named as consignees on straight bills of lading; that it was invoiced and charged on the seller's books at the full delivered price; that, pursuant to arrangement between seller and purchaser, the consignee physically paid the freight upon the acceptance of the delivery; and that he was credited with this at the rate specified in the sales contract as a part payment of the purchase price, and remitted only the balance of the purchase price."

"The objection urged is not that the company failed to make specific proof of pecuniary loss—the failure held in *Pennsylvania R. R. Co.* v. *International Coal Mining Company,* 230 U. S. 184, 206, to be fatal in a suit under Sec. 2 for unjust discrimination, and in *Davis* v. *Portland Seed Co.,* 264 U. S. 403, to be fatal in a suit under Sec. 4 for violation of the long-and-short-haul clause. The carrier concedes, as it must under *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.,* 245 U. S. 531, that a recovery for excessive freight charges can be had under Sec. 1 without specific proof of pecuniary loss, and that the measure of damages is the amount of the excess exacted. It was likewise settled by *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.* (see 190 Fed. 659; 221 Fed. 890), that where goods are sold f. o. b. destination, it is ordinarily the seller who bears the freight who suffers from the excessive charge, and who consequently is entitled to sue."

201 In a footnote to the above quotation it is said:

"Such had been the uniform decision of the Commission" Citing many decisions of the Interstate Commerce Commission.

As the court reads and understands the *Sloss-Sheffield* case it approves the holdings of the Interstate Commerce Commission rendered prior to the holding in the *Portland Cement Company* case.

In the case of *Parsons* v. *Chicago & Northwestern Railway Co.,* 167 U. S. 447, 42 L. Ed. 231, the court, on page 460, say:

"The only right of recovery given by the I. C. C. act
9 to the individual is to the 'person or persons injured thereby, for the full amount of damages sustained in consequence of any of the violations of the provisions of this

act.' So, before any party can recover under the act he must show, not merely the wrong of the carrier, but that the wrong has in fact operated to his injury."

While this language is used with reference to a state of facts different from those in this record, yet it states a fundamental rule of law.

In a reparation case damages may be recovered by those who are the real and substantial parties in interest in the transaction in which illegal transportation charges have been made. The reparation is due to the person who has been required to pay the excessive charge as the price of transportation. The judgment must be in favor of those who pay the freight charges.

Who, in this case, paid and bore the freight charges? It seems obvious from the admitted facts that it was the farmer, producer and shipper of the live stock. It was his money,
202 and not the money of the commission man, which the carrier illegally retains. He paid the freight. It is true, that the manual operation of paying the freight was through the instrumentality of the commission man. But the commission man was using the money of the shipper and not his own money. The commission man was an agent, and, in making the payments, he made them out of the funds of the farmers and shippers. He disbursed no money of his own.

This case calls for the application of the fundamental rule that the proper person to bring an action is the person whose right has been violated. The court holds that the persons whose rights have been violated and whose money the defendants now illegally retain are the farmers, producers and shippers and not the commission man.

In its opinion, 100 I. C. C. 366, in referring to the right of the plaintiffs in this case to reparation, the Commission say, on page 270:

> "The right of factors, in their representative capacity, to recover reparation in their own names for unlawful and unreasonable charges is settled."

In support of this conclusion the commission cite *Memphis Freight Bureau* v. *St. L. & S. F. R. R. Co.*, 57 I. C. C. 212. The facts in that case are substantially identical with the facts in this case. The Freight Bureau, on behalf of its members who were factors, prosecuted before the Commission claims of 3500 growers of cotton on which excessive charges had been paid. The Commission found
203 "That the complainant factors, in their representative capacity, are entitled to the reparation with interest."

The Commission men filed claims in the receivership proceeding in the District Court for the Eastern Division of the Eastern District of Missouri. A certified copy of the memorandum opinion of Judge Sanborn was used in the argument and has been handed to the court. In his opinion Judge Sanborn says:

> "The intervenors, however, pray that the payment be made to the factors. The defendant objects that the factors were not the parties damaged, the Commission so held, and there is substantial—nay, conclusive evidence that the factors did not, and that the country growers and shippers did suffer and bear the substantial damages. Notwithstanding this fact and notwithstanding the fact that the Commission itself reported and found that the factors in their representative capacity were entitled to the reparation. Its subsequent order was that the receivers be authorized and directed to pay the reparation to the factors without making any reference in that order to their representative capacity."

Judge Sanborn further says:

> "The factors insist that this court should order the amount of the reparation paid to them. But since they did not, and the growers and shippers did suffer and bear the damages the court is not pursuaded that they have either the property rights in the claims for damages or the authority to release or assign them. While, so long as a factor is engaged in discharging his active duty of paying the freight charge including the overcharge and remitting the proceeds, he may have authority to settle, compromise or release the claim of his principal for
> 204 the refund of the overcharge, because during that time he has a pecuniary interest in the claim for the refund, yet, when such a transaction is completed, without more, the property right of the shipper in the claim for the refund becomes exclusive and the factor's right or power to release, discharge, or assign it no longer exists."

But the plaintiffs contend that the factors are the representatives of the farmers, producers and shippers and in accordance with the rules of The Chicago Live Stock Exchange and with the practice and customs of the exchange with the defendants, suit may be maintained in its name. This contention is well stated by the Commission in its opinion in this case (100 I. C. C. 266), on pages 269-270:

> "the Commission merchant at the stockyards not only

disposes of the shipper's stock at the market and at such price as he deems best, but is his agent in the payment of freight and related charges, such as feeding, etc. and in the filing of claims for overcharge and for loss and damage to the stock in transit. Defendants have frequently recognized this relationship by settling loss and damage claims with the commission merchants."

This contention cannot be maintained. The right to maintain a suit is that given by the statute to "the person or persons injured." The right, therefore, to maintain a suit is given by law. Any act, practice or custom, either of The Chicago Live Stock Exchange, of the commission man or of the carriers could not confer the right to maintain the suit. In the case of *Mackay* v. *Randolph Macon Coal Co.* 178 Fed. 881, the court, among other things, says:

"Who may maintain a suit is a matter of law, not subject to be controlled by the private conventions of the parties."

205 To the same effect are the following cases:

Gusman v. *Marrero,* 180 U. S. 81;
In re Ellis, Inc., 342 Fed. 158-159 (Dist. Ct. N. J.);
Fitkin v. *Century Oil Company,* 16 Fed. (2d) 22-24;
State of Georgia to Use of Fidelity & Deposit Co. v. *Bank of Quitzan,* 45 S. E. 236 (Ga.);
Terrell v. *Stevenson,* 25 S. E. 352 (Ga.);
Baxter's Executors v. *Baxter, et al.,* 10 Atl. 1814 (N. J.);
Central Railroad & Banking Company v. *Brunswick, etc.,* 135 S. E. 520 (Ga.).

In the case of *Fitkin* v. *Century Oil Co.* 16 Fed. (2d) 22, the court say:

"The right to maintain a suit is a matter of law, and not subject to be controlled by private conventions of the parties. Suits must be in the name of the real parties in interest. The only exception to this rule is where a trustee of an express trust may maintain an action in his own name on behalf of the beneficiaries. There the trustee must be the holder of the property or obligation out of which the action arises, or a person with whom or in whose name a contract is made for the benefit of another may maintain an action upon the contract. A trustee under a mortgage comes within this exception as to the security, but not as to the bonds or notes, for they are not payable to the trustee. * * * The mere fact that

a trustee holds legal title to security does not make it in equity a creditor with respect to the debt itself."

Plaintiffs further contend that as factors they may maintain the suit because they have an interest in the recovery.

That a factor has authority to bring suit in his own name for damage or injury to goods in his business as a factor, or to recover the purchase price where he has an interest in the way of commissions or advancements and in other circumstances where he is a trustee of an express trust, there
206 seems to be no doubt. The right to sue, however, is in each instance based upon his interest or duty in the protection of the property or the proceeds of the sale.

In *Beardsley* v. *Schmidt,* 98 N. W. 235 (Wis.) in recognition of such rule and right, the court say:

"He has, as against his principal, in the absence of some stipulation to the contrary, a special interest therein and the proceeds thereof and the right to control the same until he receives his compensation for services rendered in respect thereto."

It will be noted that such rights of the factor are limited to the period

"before he receives his compensation for services rendered in respect thereto."

In the case at bar no situation bringing the plaintiffs within the well recognized rule as to suits by factors is presented. All charges, including commissions, including the one in controversy in this case, and including commissions had been paid out of the proceeds of the sale—the money of the shipper—and the net proceeds had been remitted to the shipper. Moreover, it is clear from the testimony before the commission, and now before the court, that if plaintiffs recover in this case, the plaintiff will not have a beneficial interest in the money so obtained. This is evident from the testimony of D. C. Mosier, Vice President of The Chicago Live Stock Exchange and chairman of the Transportation Committee given at the examination held at Chicago, Illinois, before Examiner Hosmer on July 14, 1921, in which he said that when this reparation is collected, if it is collected:

207 "The shipper and producer will get every cent. Not one dime, not one nickel, will be taken by The Chicago Live Stock Exchange or any of its members for the collection of this amount." (p. 37)

again, on the same day, he said:

"If this money was remitted to the commission man as

agent for the shipper, he would remit the net amount to the shipper or customer. By net amount there, I mean the full reparation. There will be no charges deducted for the collection." (p. 38)

It is apparent that the plaintiffs, commission men, have no legal interest in this proceeding. They are purely volunteers. They have adopted themselves as convenient agents to secure the recovery. They are not the ones who have been damnified by the imposition and collection of the excessive charge.

The court holds that the plaintiffs in said case cannot maintain this motion.

In must follow, and it is the ruling of the court, that the motions to direct a verdict made by the defendant, Andrew W. Mellon, Director General, as agent, etc. and a similar motion made by the Union Stock Yard & Transit Company, defendants, be and each of them is allowed. The court will instrust the jury to find the issues for the defendants.

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208 And on, to wit, the 28th day of January, 1930, there was filed in the Clerk's office of said Court a certain Verdict in words and figures following, to wit: Filed J 1930.

209 * * (Caption) * *

At the direction of the Court we, the jury, find the issues against the plaintiffs and in favor of the defendants.

WALTER B. HULL
ED. BLUNKE
FRED KIHM
RICHARD H. COOPER
LOUIS SOLAR
LLOYD J. MAYNARD
FRANK MEISINGER
ROY D. LEONARD
CLARENCE W. ANDERSON
JOHN D. HAINES
W. E. WILLIAMS
JACK H. BRADFORD

Jan. 28, 210 And afterwards, to wit, on the 28th day of January, 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

211 * * (Caption) * *

Tuesday, January 28, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

This day again come the parties to this suit by their attorneys respectively and the Jury heretofore empaneled herein for the trial of said cause also come whereupon the defendants Andrew W. Mellon, Director General of Railroads as agent and the Union Stock Yard and Transit Company by their attorneys enter herein their motion for a directed verdict which motions are allowed to which ruling of the Court the defendants by their attorneys here and now duly except thereupon the Court instructs the Jury and the Jury say, We the Jury find the issues against the plaintiffs and in favor of the defendants to which ruling of the Court the plaintiffs by their attorneys here and now duly except whereupon the plaintiffs by their attorneys enter herein their motion for a new trial in said cause which motion is overruled and a new trial denied to which ruling of the Court the plaintiffs by their attorneys here and now duly except whereupon the plaintiffs by their attorneys enter herein their motion in arrest of Judgment which motion is also overruled to which motion of the Court the plaintiffs by their attorneys here and now duly except therefore it is considered by the Court that the plaintiffs take nothing by their aforesaid action that the defendants go hence without day do have and recover of and from the plaintiffs their costs and charges in this behalf expended and have execution therefor thereupon the plaintiffs having entered their exceptions herein pray an appeal from the above judgment of this Court to the United States Circuit Court of Appeals for the Seventh Circuit which is allowed upon the plaintiffs
212 filing herein cost bond in the penal sum of Five Hundred Dollars ($500.00) to be approved by the Court within thirty days from this date and ninety (90) days time from this date is allowed the plaintiffs within which to file their Bill of Exceptions herein.

213 And on, to wit, the 31st day of January, 1930, came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court a certain Motion to Vacate Orders of January 28, 1930 and Affidavits in Support Thereof in words and figures following, to wit:

214 * * (Caption) * *

Now Come the plaintiffs in the above-entitled case, by their attorneys, Sims Godman & Stransky, and move the court to vacate and set aside the following orders and judgment entered and appearing of record in this case on Tuesday, January 28, 1930:

Order denying and overruling plaintiffs' motion for a new trial;

Order overruling and denying plaintiffs' motion in arrest of judgment;

Judgment on the verdict in favor of defendants and against plaintiffs and against plaintiffs for costs;

Orders allowing appeal, fixing time for bill of exceptions and amount of cost bond.

Plaintiffs by their said attorneys further respectfully request the court to enter this motion and set the same down for hearing and argument on some future date convenient to the court.

In support of said motion there is presented and filed herewith the affidavits of Elwood G. Godman, Esq., and Clair R. Hillyer, Esq.

SIMS, GODMAN & STRANSKY
Attorneys for Plaintiffs.

215 * * (Caption) * *

State of Illinois } ss.
County of Cook. }

ELWOOD G. GODMAN, being first duly sworn, on oath, deposes and says:

I am a practicing lawyer in Chicago, Illinois and a member of the firm of Sims Godman & Stransky, attorneys at law, and one of the attorneys for the plaintiffs in the above-entitled

case and in association with Clair R. Hillyer, Esq., conducted the trial of the above-entitled case before the District Court of the United States, for the Eastern Division of the Northern District of Illinois, His Honor, Judge Woodward, presiding, and in which case on January 28, 1930, at the direction of the court, the jury returned a verdict in favor of the defendants and against the plaintiffs in said case. That immediately upon the return of the verdict by the jury as aforesaid, a motion for a new trial was made and without argument thereon overruled and a motion in arrest of judgment then made and without argument thereon overruled and exceptions duly taken and allowed to the action of the court in so overruling said motions, and judgment was rendered by the court upon the verdict and for costs against the plaintiffs. A lengthy
216 written opinion was rendered by the court immediately prior to directing the jury to return a verdict as aforesaid in favor of the defendants and at the time when the motion for a new trial was made there was not sufficient time in which to digest and analyze the lengthy opinion thus rendered to enable counsel to properly present and argue the grounds existing in support of said motion for a new trial. The case involves very important principles of law and the decision of the court denies to the plaintiffs the right which they assert to recover from the defendants a large amount of money, towit, in excess of Two Hundred Thousand Dollars ($200,000.), which amount had been awarded to them by the Interstate Commerce Commission as reparations for excessive freight charges illegally collected by the defendants.

Since the decision of the court a careful analysis and study of the written opinion of the colrt leads counsel to believe that the motion for a new trial has substantial grounds proper to be presented in argument to the court in support thereof, and inasmuch as the decision was rendered on January 28, 1930 and the term of court is about to expire, affiant believes that the ends of justice will be advanced and served if the motion presented herewith to vacate the judgment entered on January 28, 1930 as above stated and to vacate the orders overruling plaintiffs' motion in arrest of judgment and plaintiffs' motion for a new trial be allowed, so that the court may be further advised in respect to the grounds which may properly be urged in support of said motion for a new trial.

Affiant does not mean to intimate by the statements herein that the court arbitrarily denied counsel the right to be heard in support of the motion for a new trial, but to merely state that there had not been sufficient time in which to analyze and

digest the court's opinion to enable counsel to advise the
217 court of the legal reasons and arguments which could be
properly called to the court's attention in support of said motion for a new trial.

Further affiant sayeth not.

ELWOOD G. GODMAN.

Subscribed and sworn to before me, a Notary Public in and for the County and State aforesaid, this 31st day of January, A. D. 1930.

DONALD B. HATMAKER
Notary Public.

My commission expires February 27, 1933.

State of Illinois }
County of Cook. } ss.

CLAIR R. HILLYER, being first duly sworn, deposes and says that he has read the foregoing affidavit of Elwood G. Godman, Esq., and was associated with Mr. Godman in the trial of the above-entitled case and knows the facts and joins in said affidavit of Mr. Godman and adopts the same as his own.

Further affiant sayeth not.

CLAIR R. HILLYER

Subscribed and sworn to before me, a Notary Public in and for the County and State aforesaid, this 31st day of January, A. D. 1930.

DONALD B. HATMAKER
Notary Public.

My commission expires February 27, 1933.

218 And afterwards, to wit, on the 31st day of January, 1930, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

Jan. 31, 219 • • (Caption) • •

Friday, January 31, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

This day come the plaintiffs by their attorneys and enter herein their motion to vacate and set aside the orders heretofore entered herein on January 28, A. D. 1930 as set forth in the plaintiffs' written motion which motion is entered and set for hearing March 3, A. D. 1930.

Feb. 27, 220 And afterwards, to wit, on the 27th day of February, 1930, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

221 • • (Caption) • •

Thursday, February 27, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

On motion of plaintiffs' attorney It Is Ordered that the motion to vacate the order heretofore taken and entered herein of record be and the same is hereby continued from March 3, A. D. 1930 to March 28, A. D. 1930.

222 And afterwards, to wit, on the 21st day of March, 1930, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

223 * * *(Caption)* * * Entered 1930.

Friday, March 21, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

On motion It Is Ordered that the plaintiffs' motion to vacate the orders of January 28, A. D. 1930 and the affidavits in support of motion now set for March 28, A. D. 1930 be and the same is hereby continued and reset for hearing April 11, A. D. 1930.

224 And afterwards, to wit, on the 7th day of April, 1930, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit: Entered 1930.

225 * * (Caption) * *

Monday, April 7, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

On motion It Is Ordered by the Court that the motion to vacate the orders heretofore taken and entered herein of record January 28, A. D. 1930 be and the same is hereby continued to April 18, A. D. 1930.

226 And on, to wit, the 11th day of April, 1930 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court certain Reasons in Support of Motion to Vacate and Set Aside Orders Entered January 28, 1930 Motion to Amend Petition Amendment to Petition in words and figures following, to wit:

r. 11, 227 * * (Caption) * *

REASONS ASSIGNED IN SUPPORT OF MOTION TO VACATE AND SET ASIDE ORDERS ENTERED IN THE ABOVE ENTITLED CAUSE ON JANUARY 28, 1930.

Now come the plaintiffs in the above entitled cause, by their attorneys, Sims, Godman & Stransky, and in support of and supplementary to their motion heretofore filed to set aside the following orders and judgment entered and appearing of record in this case on Tuesday, January 28, 1930,

1. Order denying and overruling plaintiffs' motion for new trial;

2. Motion overruling and denying plaintiffs' motion in arrest of judgment;

3. Judgment on the verdict in favor of defendants and against the plaintiffs, and against the plaintiffs for costs;

4. Orders allowing appeal, fixing time for bill of exceptions and amount of cost bond;

represent and show unto the court that on Tuesday, January 28, 1930, His Honor, Judge Woodward, presiding, announced his decision relative to a motion made at the close of all of the testimony in said cause to direct the jury sworn and im-
228 paneled in said cause to return a verdict in favor of the defendants and against the plaintiffs, and thereupon read a length written opinion setting forth particularly the reasons for his decision granting said motion; that immediately after reading his said written opinion His Honor, Judge Woodward, instructed or directed the jury impaneled and sworn to try the issues in the said case to return a verdict in favor of the defendants and against the plaintiffs in said case; that said jury thereupon returned into open court, pursuant to said instruction and direction of the court, its verdict in favor of the defendants and against the plaintiffs in the case; that thereupon the plaintiffs verbally made a motion for a new trial, which motion was thereupon without argument or discussion overruled; that thereupon the plaintiffs verbally made a motion in arrest of judgment, which motion was also without argument or discussion overruled; that thereupon the court directed that judgment be entered in favor of the defendants and against the plaintiffs and against the plaintiffs for costs, and thereupon entered orders allowing an appeal to the plain-

tiffs, fixing the time for the filing of bill of exceptions and the amount of cost bond.

Plaintiffs, however, disclaim any intimation or insinuation that His Honor, Judge Woodward, arbitrarily denied counsel the right to be heard in support of said motions, because such is not the fact. Plaintiffs, however, represent to the court that the attorneys for the plaintiffs did not have sufficient time, prior to making said motions, to digest and analyze the lengthy opinion of His Honor, Judge Woodward, so as to then present to the court such arguments and motions as might be necessary and appropriate to meet or overcome
229 the reasons assigned by the court in its opinion for holding against plaintiffs; that after counsel had studied and analyzed the opinion of His Honor, Judge Woodward, it became apparent to counsel that the holding of the court directing a verdict in favor of the defendants and against the plaintiffs was based solely on the ground that plaintiffs had filed said petition in the above entitled cause in their individual capacities and that the proof offered in the case showed that the persons who were injured by the charging of the alleged excessive, unreasonable and unlawful loading and unloading charges set forth in said petition were the shippers of live stock who ultimately bore said charges and not the plaintiffs named in said petition who represented said shippers in the various shipments of live stock mentioned and set forth in said petition; that the attorneys for said plaintiffs, after studying and analyzing the opinion of His Honor, Judge Woodward, and after a careful investigation of the facts in this case and a study of the law with reference to their right to amend the petition herein, came to the conclusion that by a proper amendment of the petition filed in the above entitled cause changing the capacity in which plaintiffs bring this suit the cause of action set forth in the petition filed herein may be properly maintained, in accordance with the opinion of the court; that thereafter at the same term of court in which the above-mentioned orders of said court were entered, plaintiffs filed their said motion to vacate and set aside said orders entered as aforesaid on Tuesday, January 28, 1930.

Plaintiffs further represent that they have duly filed in this cause their verified motion to amend the petition filed in
230 this cause, particularlly setting forth the facts and circumstances with reference to the relationship existing between themselves and upwards of one hundred seventy-four thousand (174,000) shippers whom said plaintiffs represented in the various shipments of live stock in relation to which the

excessive, unlawful and unreasonable charges set forth in the petition in this case arose, and showing particularly the capacity in which said plaintiffs appeared before said Interstate Commerce Commission and procured from said Interstate Commerce Commission the order of reparation in the sum of One Hundred Forty Thousand and One Dollars and Twenty-five Cents ($140,001.25), as set forth in the petition herein; that a copy of said verified motion to amend the peition herein is hereto attached and made a part of this motion.

Plaintiffs further represent that this motion to set aside and vacate the said orders entered as aforesaid by this Honorable Court on the 28th day of January, 1930, is made in good faith in order that said verified motion to amend said petition changing the capacity in which said plaintiffs bring this suit may be considered and passed upon by this Honorable Court.

Plaintiffs in seeking to have said orders so entered as aforesaid on Tuesday, January 28, 1930, vacated and set aside in order that they may be allowed to file and have considered and passed upon their said motion to amend their said petition, respectfully reserve the right, in the event said motion to set aside said orders of January 28, 1930, is denied, to argue before this court and to contend in any court of review that
231 the action of His Honor, Judge Woodward, in instructing the jury to return a verdict in favor of the defendants and against the plaintiffs was and is erroneous.

SIMS, GODMAN & STRANSKY
Attorneys for Plaintiffs.

EDWIN W. SIMS
ELWOOD G. GODMAN
FRANKLIN J. STRANSKY
CLAIR R. HILLYER
Of Counsel.

232 * * (Caption) * *

MOTION TO AMEND PETITION.

Now come the plaintiffs in the above-entitled cause, by Edwin W. Sims, Elwood G. Godman, Franklin J. Stransky and Clair R. Hillyer, their attorneys, and respectfully petition the court for leave to amend their petition filed in the above-entitled cause on the 8th day of December, A. D. 1928, in accordance with the draft of said proposed amendment hereto attached and made a part of this motion.

Your petitioners hereby represent to the court as grounds for granting leave to amend said petition filed in the above-entitled cause, as aforesaid, on the 9th day of December, A. D. 1828, the following facts, viz:

That prior to May 21, 1917, there was in effect a tariff published and filed with the Interstate Commerce Commission by the Union Stock Yard and Transit Company, one of the defendants in the above-entitled cause, which provided that
233 charges of twenty-five cents (25c) for unloading each car of live stock and fifty cents (50c) for loading each car of live stock would be assessed by said defendant, the Union Stock Yard and Transit Company, on all cars of live stock loaded or unloaded by it at the Union Stock Yards in Chicago, Illinois; that there was also in effect another tariff published and filed with the Interstate Commerce Commission, to which the following named railroads were parties, viz: The Atchison, Topeka & Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Chicago Railroad Company; The Chesapeaks and Ohio Railway Company of Indiana; The Chicago and Alton Railroad Company, and William W. Wheelock and William G. Bierd, Receivers; Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis & Louisville Railway Company; Chicago Junction Railway Company; Chicago, Milwaukee and St. Paul Railway Company, and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers; The Chicago, Rock Island and Pacific Railway Company; Chicago Terre Haute & Southeastern Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Grand Trunk Western Railway Company; Illinois Central Railroad Company; Indiana Harbor Belt Railroad Company; The Michigan Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; New York Central Railroad Company; New York, Chicago & St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; The Toledo, St. Louis & Western Railroad Company, and J. Frank Johnson and Harry A. Dunn, Receivers; and
Wabash Railway Company, all of which railroads and sys-
234 tems of transportation were operated and controlled by the predecessors in office of said Andrew W. Mellon dur-

ing the period of federal control of railroads, to-wit: December 28, 1917, to March 1, 1920; that all of said railroad companies and corporations last named have and during said period of federal control had systems of transportation and roads running through the Eastern Division of the Northern District of Illinois, with the exception of The Toledo, St. Louis & Western Railroad Company, and J. Frank Johnson and Harry A. Dunn, Receivers, which railroad company is now a part of the system of the New York, Chicago & St. Louis Railroad Company, and which system has a road running through the Eastern Division of the Northern District of Illinois; that said last-mentioned tariff, to which said railroads were parties, provided that the sum of twenty-five cents (25c) for unloading each car of live stock and fifty cents (50c) for loading each car of live stock would be absorbed and paid by said railroad companies, respectively, to said Union Stock Yard and Transit Company on all cars of live stock loaded or unloaded by that company at said Union Stock Yards and shipped into said Union Stock Yards by said railroads; that said last-mentioned tariff was and is known as Agent L. A. Lowry's Tariff 20-J, I. C. C. No. 37, and supplements thereto.

That effective May 21, 1917, the defendant the Union Stock Yard and Transit Company filed with said Interstate Commerce Commission its tariff I. C. C. No. 2, whereby it increased said charges from twenty-five cents (25c) per car for unloading to fifty cents (50c) per car for unloading, and from fifty cents (50c) per car for loading to seventy-five cents (75c) per car for loading; that no tariff was filed with said Interstate Commerce Commision by said railroads absorbing said in-
235 crease in said unloading and loading charges, and therefore all shippers and receivers of live stock were, after May 21, 1917, compelled to pay and did pay to said defendant the Union Stock Yard and Transit Company and to said railroads said increase in the charge, viz:—twenty-five cents (25c) per car for unloading and twenty-five cents (25c) per car for loading, in accordance with said increase created by said tariff I. C. C. No. 2 filed as aforesaid with said Interstate Commerce Commission by said defendant Union Stock Yard and Transit Company; that effective with the taking over of said railroads under federal control, December 28, 1917, all shippers and receivers of live stock to and at said Union Stock Yards were compelled to and did pay the respective Directors General of Railroads appointed by the President of the United States in accordance with the law the said increase of twenty-

five cents (25c) per car for unloading and the said increase of twenty-five cents (25c) per car for loading; that during the said period from December 28, 1917, to March 1, 1920, the stock yards of the said defendant the Union Stock Yard and Transit Company were the terminals of the predecessors in office of the said defendant Andrew W. Mellon in each of the shipments of live stock hereinafter referred to and on which the sum of fifty cents (50c) per car was exacted for unloading and the sum of seventy-five cents (75c) per car was exacted for loading; that upon the filing by said Union Stock Yard and Transit Company of its said tariff Supplement No. 1 to I. C. C. No. 6 there were filed with said Interstate Commerce Commission formal protests against said tariff, whereupon said Interstate Commerce Commission from time to time thereafter suspended the operation of said tariff and set the matter down for hearing under its Investigation and Suspension Docket No. 1118.

That on or about October 2, 1917, the Chicago Live
236 Stock Exchange, on behalf of its members and others engaged in the buying, selling and shipping of live stock to and at the Union Stock Yards at Chicago, Illinois, filed a complaint in writing with the Interstate Commerce Commission, alleging and charging said loading and unloading charges so fixed in said tariff I. C. C. No. 2, filed with said Interstate Commerce Commission by said defendant the Union Stock Yard and Transit Company and effective May 21, 1917, as aforesaid, to be unlawful, unjust and unreasonable under the Interstate Commerce Act; that the said Interstate Commerce Commission thereupon docketed said complaint under Interstate Commerce Commission Docket No. 9977; that the said carriers hereinabove specifically named, which were made defendants in said Case No. 9977 before said Interstate Commerce Commission, are the same carriers and railroads which are named in said petition filed in this court on the 8th day of December, A. D. 1928, as aforesaid; that said corporate carriers and railroads filed their answers to said complaint in said case No. 9977 before said Interstate Commerce Commission and the issues in said case were duly made; that said case Docket No. 9977 and said case Investigation and Suspension Docket No. 1118 were, thereafter, by appropriate proceedings, duly consolidated before said Interstate Commerce Commission for hearing; that thereafter a full hearing was had with reference to said cases on or about February 11, 1919, at which hearing representatives

of said Chicago Live Stock Exchange and of said corporate carriers and railroads were present and participated therein; that thereafter said Interstate Commerce Commission issued its report and decision in said consolidated cases and dismissed said complaint, said report and decision being reported in 52 I. C. C. 209, attached to the petition heretofore filed
237 in this court on the 8th day of December, A. D. 1928, and therein designated Exhibit "C" to said petition and being made a part of said petition; that on or about April 14, 1919, upon petition of the complainant in said complaint Docket No. 9977 for rehearing and application to amend its complaint by making the Director General of Railroads a party defendant, the said Interstate Commerce Commission issued an order in said Docket No. 9977 and said Investigation and Suspension Docket No. 1118, in words and figures as follows:

"Supplemental Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 14th day of April, A. D. 1919.

No. 9977

Chicago Live Stock Exchange

vs.

The Atchison, Topeka & Santa Fe Railway Company *et al.*
Investigation and Suspension Docket No. 1118.

In the Matter of the Investigation and Suspension of Live Stock Loading and Unloading Charges at Chicago, Ill.

Upon further consideration of the records in the above-entitled proceedings, of petition for rehearing filed by the Chicago Live Stock Exchange and Union Stock Yard & Transit Company, and of application of the Chicago Live Stock Exchange to amend its complaint by making the Director General of Railroads a party defendant:

It Is Ordered, That these proceedings be, and they are hereby, reopened for further hearing, on the question of the amount of the loading and unloading charges for live stock at the Chicago stock yards, and the amount of such charges, if any, that should be imposed upon shippers of live stock, or

should be absorbed by the defendants and whether the Chicago Stock Yards are terminals of the Chicago Junction Railway Company, and whether the tariff arrangements between
238 the Union Stock Yard & Transit Company and the other defendants with respect to the delivery and handling of live stock at the Union Stock Yards in Chicago are in compliance with the act.

It Is Further Ordered, That the petition of the Union Stock Yard & Transit Company, so far as it seeks a reopening of the case for the purpose of reconsideration of the finding that it is a common carrier be, and it is hereby, denied.

It Is Further Ordered, That Walker D. Hines, Director General of Railroads, be, and he is hereby, made an additional party respondent herein.

It Is Further Ordered, That a copy of this order be served upon each of the parties to these proceedings.

And It Is Further Ordered, That these proceedings be, and they are hereby, assigned for further hearing on May 20, 1919, ten o'clock a. m., at United States Court Room, Chicago, Ill., before Examiner Gerry.

By the Commission:

GEORGE B. MCGINTY,
(Seal) *Secretary.*".

That thereafter said consolidated case, Docket No. 9977, and said Investigation and Suspension Docket No. 1118, duly consolidated as aforesaid, were reheard by said Interstate Commerce Commission, the said Director General of Railroads being duly represented and taking an active part in said proceedings; that thereafter, on or about July 15, 1920, said Interstate Commerce Commission issued its report on further hearing reported in 58 I. C. C. 164, and found that the said unloading and loading charges were unlawful and in violation of the Interstate Commerce Act, said decision and report being attached to the said petition heretofore filed in this court in this cause and there designated Exhibit "B" and made a part of said petition by reference; that on February 25, 1921, there was duly filed with said Interstate Commerce Commission a complaint for reparation on behalf of upwards of one hundred seventy-four thousand (174,000)
239 shippers of live stock who had been damaged by the assessment and collection of said loading and unloading charges hereinabove set forth in the amount of such charges paid for them; that said complaint was given Interstate Com-

merce Commission Docket No. 12614; that said complaint for reparation was filed by the following named persons, or their legal predecessors, who were members of said Chicago Live Stock Exchange between the dates of December 28, 1917, and February 28, 1920, when said excessive and unreasonable loading and unloading charges were paid, and who are the plaintiffs named in Paragraph 2 of the petition herein:

Geo. J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen.

John G. Adler and Alfred E. Adler, copartners trading as Adler Sons & Company.

Alexander, Conover and Martin, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

John A. Babcock, an individual trading as John A. Babcock & Company.

Fred L. Heyne and E. H. Baker, copartners trading as Baker, Heyne & Company.

W. A. Peterson, trading as Bacon, Peterson & Company.

Bowles Live Stock Commission Company, a corporation organized and existing under the laws of the State of West Virginia with its principal place of business at Chicago in the State of Illinois.

E. C. Brown and Seth B. St. John, copartners trading as Brown-St. John Company.

240 Thos. H. Brown.

George M. Brownson and J. L. Ettlinger, copartners trading as Brownson & Ettlinger.

Byers Brothers Company, a corporation organized and existing under the laws of the State of Missouri with its principal place of business at Chicago in the State of Illinois.

Wm. B. Swiney, Chas. M. Swiney and Thos. E. Swiney, copartners trading as Swiney Bros., successors to Bunker & Swiney.

J. B. Cahill, trading as J. B. Cahill & Company.

Central Live Stock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Ernest Clark and Louis Armbrecht, copartners trading as Clark, Armbrecht & Company.

E. A. Clark, trading as Clark, Bowles & Company.

John Clay, John G. Forrest, C. A. Kleman, F. H. Connor

and C. L. Robinson, copartners trading as Clay, Robinson & Company.

James R. Clegg, an individual trading as James R. Clegg & Company.

A. M. Henneberry and N. W. Cochran, copartners trading as Cochran & Henneberry.

W. P. Collings, trading as W. P. Collings & Son.

Conklin Bros. Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

H. D. Copeland & Company, a corporation organized
241 and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

J. M. Corrick.

J. F. Cross and H. G. Sommers, copartners trading as Cross, Sommers & Company.

A. B. Daniels.

P. T. Dolan and Fred Ludeman, copartners trading as Dolan & Ludeman.

J. M. Doud & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

S. S. Driver, an individual trading as S. S. Driver & Company.

Chas. R. Beason and P. E. Moore, copartners trading as Drovers Commission Company.

J. W. Eastland, an individual trading as J. W. Eastland & Company.

Guy Wheeler and T. K. Polley, copartners trading as Emmett, Wheeler & Polley.

E. H. Kuenster, surviving partner of copartnership of Erwin & Kuenster.

Evans, Snider, Buel Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Filler Wilson & McClelland, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

242 O. D. Freeland and C. M. Godfrey, copartners trading as Freeland & Godfrey.

Fred Freeman, an individual trading as Fred Freeman & Company.

P. J. Fitzgerald and G. S. Freeman, copartners trading as Freeman, Fitzgerald & Company.

Wm. Gentleman, A. M. Gentleman, C. F. Gentleman and G. J. Gentleman, copartners trading as Wm. Gentleman & Sons.

S. G. Gillogly, R. E. Gillogly, F. D. Gillogly and F. T. Gillogly, copartners trading as Gillogly & Company.

Chas. E. Harding, trading as Chas. E. Harding & Company.

Hefner Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Geo. F. Hogan, trading as Geo. F. Hogan & Company.

A. Warheimer, E. H. Ingwerson, J. H. Ingwerson, Dan R. Ingwerson, D. C. Mosier and A. C. Barroff, copartners trading as Ingwerson Bros.

Iowa Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois, with its principal place of business at Chicago in the State of Illinois.

I. W. Knettle and Edwin Knettle, copartners trading as Knettle Bros.

Knollin Sheep Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

E. H. Kuenster, an individual trading as Kuenster Livestock Commission Company.

243 A. J. Laberthe.

L. S. Larrison, an individual trading as L. S. Larrison & Company.

Lee Live Stock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

F. C. Ludeman, an individual trading as F. C. Ludeman & Company.

McCausland, Hoag & Vaughn, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Wm. Mahoney.

J. P. Maley and Harry L. Carpenter, copartners trading as Maley, Carpenter & Company.

John P. Martin, James G. Martin, George E. Martin and Wm. S. Burmister, copartners trading as Martin Bros. & Company.

Miller White & Woods, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

P. T. Dolan, trading as Miller & Dolan.

Frank R. Mullen, trading as Mullen Commission Company.

Robert S. Murray, trading as Murray & McDowell.

B. F. Hubbird, trading as Minteer Hubbird & Company.

National Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

244 Northwestern Livestock Commission, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

G. W. Nixon, C. S. Horn and W. H. Chisholm, copartners trading as Nixon, Horn & Chisholm.

North American Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Silas Palmer and W. H. Palmer, copartners trading as Silas Palmer & Son.

T. B. Vincent and C. H. Boothroyd, copartners trading as Paris Commission Company.

W. C. Patterson, trading as John Patterson & Son.

W. A. Peterson and Wm. Turnbull, copartners trading as Peterson, Turnbull & Company.

J. H. Piatt, trading as Abner Piatt & Company.

Thos. K. Polley, trading as Thos. K. Polley & Company.

R. H. Pritchard, trading as Pritchard Commission Company.

Chas. R. Rice and Oscar A. Rice, copartners trading as Rice Bros.

J. B. Roach and W. P. Roach, copartners trading as Roach Livestock Commission Company.

Rosenbaum Brothers & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

F. W. Sheldon, trading as F. W. Sheldon & Company.

W. Harry Sherwood and Russell H. Sherwood, co-
245 partners trading as Sherwood & Son.

J. Paul Shinn, Chas. H. Moberly and I. O. Fry, co-

partners trading as Shinn, Fry & Moberly, successors to Shinn Fry & Company.

James G. Shutter.

W. R. Smith, J. C. Eastes and John Smith, copartners trading as W. R. Smith & Son.

T. B. Stafford and A. B. Stafford, copartners trading as Stafford Bros.

Standard Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

A. F. Starrett Jr., O. A. Mathison, A. C. Granger and M. E. Peschong, copartners trading as Starrett, Mathison & Company.

Chas. H. Stephens, and J. A. Goble, copartners trading as Stephens & Goble.

A. F. Stewart, trading as A. F. Stewart & Company.

J. E. Strader and J. L. Strader, copartners trading as Strader Bros.

J. J. Sullivan and J. C. Sullivan, co-partners trading as Sullivan Commission Company.

A. Gilmore, C. L. Swanson and C. J. Castenholz, copartners trading as Swanson, Gilmore and Castenholz.

Harry Thompson and C. N. Ball, copartners trading as Thompson & Ball.

Thos. Tipton, E. M. Steck and W. P. Herrick, copartners trading as Tipton, Steck & Herrick.

D. L. Trout and F. L. Trout, copartners trading as Trout Livestock Commission Company.

246 G. B. Van Norman, an individual trading as G. B. Van Norman & Company.

Van Norman Lawler & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

W. H. Walter, trading as Walter Bros.

A. A. Walters, C. A. Dunbar and J. H. Dunbar, copartners trading as Walters & Dunbar.

L. B. Werden.

W. W. Wilson and Chas. A. Wilson, copartners trading as W. W. Wilson & Company.

Jet Wimp, trading as Jet Wimp & Company.

Kay Wood and Chas. A. Wood, copartners trading as Wood Bros.

Curtis A. Wood and Walter R. Wood, copartners trading as Curtis A Wood & Company.
L. B. Yancey.
W. E. Young, trading as W. E. Young & Company.

That said complaint was filed jointly by the above-named commission merchants and members of said Chicago Live Stock Exchange as representatives of said shippers of live stock numbering upwards of one hundred seventy-four thousand (174,000), and whose names were contained in Appendix A attached to said complaint for reparation filed with said Interstate Commerce Commisison; that although in said proceedings for reparation before said Interstate Commerce Commission the above-named commission merchants and members of said Chicago Live Stock Exchange acted jointly with each other, each of the above-named commission merchants and members of said Chicago Live Stock Ex-
247 change in said proceedings respectively presented and represented the claims of the particular shippers of live stock whom they had previously represented and acted for as commission merchants in the various shipments of live stock made between December 28, 1917, and February 28, 1920, and upon which said unreasonable and unlawful loading and unloading charges were made; that in each instance where said unreasonable and unlawful loading and unloading charges were made, the same were paid to said corporate carriers and railroads, or the liability to pay the same was primarily and directly assumed by said commission merchants and members of said Chicago Live Stock Exchange and in the first instance paid out of the individual funds or moneys of said commission merchants and members of said Chicago Live Stock Exchange and charged back against said individual shippers or deducted from the proceeds due to said individual shippers from said shipments, with the representation and assurance by said commission merchants and members of said Chicago Live Stock Exchange that they, in behalf of said shippers, would present to said Interstate Commerce Commission a claim for reparation for the use and benefit of said shippers; that said proceedings for reparation before said Interstate Commerce Commission were prosecuted by the above-named commission merchants and members of said Chicago Live Stock Exchange, on the theory that each of said members of said Chicago Live Stock Exchange doing business in said Union Stock Yards as commission merchants was seeking reparation in a representa-

tive capacity for the use and benefit of the particular shippers of live stock who, during said period between December 28, 1917, and February 28, 1920, had shipped live stock to such member, and which member in the first instance paid said excessive and unlawful loading and unloading
248 charges on shipments made by the particular customer shippers to such member, and primarily paid or assumed by said member and charged back to said individual customer shippers as aforesaid; that in said proceedings for reparation before said Interstate Commerce Commission said Interstate Commerce Commission proceeded on the theory and basis that each of said individual members of said Live Stock Exchange whose names are hereinabove mentioned and set forth, were seeking reparation as representatives of and for the use and benefit of the particular shippers whom they severally represented in said shipments of live stock made between December 28, 1917, and February 28, 1920, and whose identity was and is shown by the list of names of shippers set forth in Appendix A filed in said proceedings for reparation before said Interstate Commerce Commission for the purpose of making said shippers, (numbering upwards of one hundred seventy-four thousand (174,000), as aforesaid), parties to the record in said Interstate Commerce Commission proceedings; that said list of shippers so filed was duly registered and accepted by said Commission, as will more fully appear by the decisions, opinions and reports of said Interstate Commerce Commission in said reparation proceedings referred to and made a part of said petition heretofore filed in this court in the above entitled cause as aforesaid; that in said proceedings for reparation said Interstate Commerce Commission awarded reparation to each of said members of said Chicago Live Stock Exchange doing business in said Union Stock Yards as commission merchants, for the aggregate amount of the excessive loading and unloading charges primarily paid and assumed as aforesaid by each member on account of shipments made to such member by the par-
249 ticular shippers of live stock represented in said shipments by such member, as will more fully appear from the order of said Commission in said consolidated cases Nos. 9977 and 12614, said order bearing date the 12th day of December, A. D. 1927, a true and correct copy thereof being attached as Exhibit "A" to said petition filed in this court in the above entitled cause and made a part of said petition by reference and to the same extent and as fully as though the

same were therein set out; that each line or item in said Exhibit "A," under columns designated "Complainants," "Defendants" and "Amounts," are compilations made from Commission Exhibit 1-A, consisting of approximately twelve thousand (12,000) sheets filed in said Dockets Nos. 1118, 9977 and 12614 of said Interstate Commerce Commission, on which sheets there appears a detailed and precise statement of the history of each shipment on which said excessive and unlawful loading and unloading charges were made, and setting forth the number and initial of the car, the date of delivery, the number and date of the way-bill, the name of the originating station, the name of the consignor, the name of the consignee, the route, the commodity, the amount of reparation claimed, and the amount of interest at six per cent claimed on the amount of such reparation; that by comparing the various items on said sheets of said Exhibit 1-A with the items aforesaid set forth in said Exhibit "A" filed with the petition herein and made a part thereof by reference, the identity between each individual shipper mentioned and referred to in said Appendix A, consisting of upwards of one hundred seventy-four thousand (174,000) names, and the particular commission merchant and member of said Live Stock Exchange who represented said shipper in said shipments, and who in turn represented said shipper before said Interstate Commerce Commission in said claim for reparation, may be fully established;

250 That in the trial of the above entitled cause in this court there was introduced in evidence the complete records and files of said Interstate Commerce Commission in said Dockets Nos. 1118, 9977 and 12614, including said Appendix A, consisting of the names and identity of upwards of one hundred seventy-four thousand (174,000) shippers in whose behalf reparation was sought before said Interstate Commerce Commission as aforesaid, said Exhibit 1-A, consisting of approximately twelve thousand (12,000) sheets containing a detailed history of each shipment, the number and initial of the car, the date of its delivery, the number and date of the way-bill, the name of the originating station, the name of the consignor, the name of the consignee, the route, the commodity, the reparation claimed, and the interest claimed on said reparation, and the order of said Interstate Commerce Commission entered on the 12th day of December, A. D. 1927, as aforesaid, a copy of which is attached to the petition filed in the above entitled cause in this court and marked Exhibit A

and made a part of said petition; so that your petitioners represent to the court that from the record in this cause, and from the record in said Dockets Nos. 1118, 9977 and 12614 of said Interstate Commerce Commission, there is shown all of the facts hereinabove set forth, on the basis of which it can readily be determined that in said proceedings before said Interstate Commerce Commission each of the plaintiffs in the above entitled cause in this court represented and secured reparation for and on behalf of the individual shippers respectively represented by such plaintiffs during the period aforesaid.

Your petitioners further show to the court that by reason of the facts and circumstances hereinabove set forth each of your petitioners (who are identical with the plaintiffs
251 named in said petition filed in this court in the above entitled cause on the 8th day of December, A. D. 1928) by operation of law became and now are trustees of an express trust, with the duty and obligation of enforcing in this court in their respective representative capacities, for the use and benefit of the individual shippers whom they represented in said shipments and whom they represented in said proceedings for reparation before said Interstate Commerce Commission, the award of reparation made to them by said Interstate Commerce Commission as representatives of and for the use and benefit of said individual shippers.

Your petitioners further show unto the court that in the petition heretofore filed in this court in the above entitled cause on the 8th day of December, A. D. 1928, your petitioners brought this suit in their individual names as plaintiffs, on the theory that because of the fact that they in the first instance paid to said defendants the amount of said excessive and unlawful loading and unloading charges, that there was such privity between them and the defendants in said cause as would legally entitle your petitioners to institute said suit in this court to enforce said award of reparation of said Interstate Commerce Commission, but that Your Honor has held against this theory, and has heretofore, on that ground, directed the jury impanelled to try said cause, to return a verdict of not guilty against the above-named defendants; that your petitioners respectfully petition Your Honor for leave to amend their said petition filed in this court in the above entitled cause on the 8th day of December, A. D. 1928, by changing the capacity in which said plaintiffs bring this suit

to a representative capacity, whereby each of your peti-
252 tioners and plaintiffs named in the said petition filed in this court in the above entitled cause, as aforesaid, may sue to enforce said award of reparation of said Interstate Commerce Commission as representatives and trustees of the particular shippers of live stock whom they represented in the various shipments covered by said order of reparation of said Interstate Commerce Commission and whose claims for reparation were presented and prosecuted by them as aforesaid before said Interstate Commerce Commission.

Your petitioners attach hereto, as a part of this motion to amend petition, their proposed amendment, same being marked Exhibit "A".

EDWIN W. SIMS
ELWOOD G. GODMAN
FRANKLIN J. STRANSKY
CLAIR R. HILLYER
Attorneys for said plaintiffs.

State of Illinois }
County of Cook } ss.

CLAIR R. HILLYER, being first duly sworn, on oath deposes and says that he is of counsel for the plaintiffs in the above entitled cause; that he has read and carefully examined the above and foregoing motion to amend petition and is thoroughly familiar with the contents thereof; that he was attorney for said plaintiffs and for said Chicago Live Stock Exchange in all of the various proceedings before said
253 Interstate Commerce Commission subsequent to April 1, 1919; that he attended all of the hearings in said matters before said Interstate Commerce Commission subsequent to April 1, 1919; that previous to the time of the institution of said proceedings, and at the time of the pendency thereof, he had full knowledge of the relationship between said plaintiffs and the individual shippers whom they represented in said proceedings; and that the facts as hereinabove set forth in said motion to amend said petition are true as therein stated.

CLAIR R. HILLYER.

Subscribed and sworn to before me, the undersigned Notary Public in and for the County of Cook and State of Illinois, this 11th day of April, A. D. 1930.

FRANCES BECKER,
Notary Public.

(Seal)

254 * * (Caption) * *

AMENDMENT TO PETITION.

Now come the plaintiffs in the above entitled cause, by Edwin W. Sims, Elwood G. Godman, Franklin J. Stransky and Clair R. Hillyer, their attorneys, and, by leave of court first obtained, file this as their amendment to the petition in the above entitled cause filed in this court on the 8th day of December, A. D. 1928.

1. Strike from paragraph (2) of said petition, on page 2 thereof, after the word "plaintiffs" in the first line of said paragraph, the following:

"are, and each of them is, named in an order of the Interstate Commerce Commission entered on the 12th day of December, 1927, as being entitled to receive from the defendants hereinafter named the amounts respectively set forth in said order of the Commission, a copy of which is hereto attached as Exhibit 'A' and made a part hereof to the same extent and as fully as though the same were here set out:

The following named are the plaintiffs herein and are the parties entitled to receive the damages awarded by the Interstate Commerce Commission:".

255 2. At the end of said paragraph (2) of said petition, on page 9 thereof, insert the following:

That the above mentioned plaintiffs bring this suit as trustees and representatives for the use and benefit of the individual shippers whom they or their legal predecessors represented in the shipments of live stock and in the proceedings for reparation before the Interstate Commerce Commission, by virtue of the following facts, viz:

That prior to May 21, 1917, there was in effect a tariff published and filed with the Interstate Commerce Commission by the Union Stock Yard and Transit Company, one of the defendants in the above entitled cause, which provided that charges of twenty-five cents (25c) for unloading each car of live stock and fifty cents (50c) for loading each car of live stock would be assessed by said defendant, the Union Stock Yard and Transit Company, on all cars of live stock loaded or unloaded by it at the Union Stock Yards in Chicago, Illinois; that there was also in effect another tariff published and filed with the Interstate Commerce Commission, to which the following named railroads were parties, viz.: The Atchi-

son, Topeka & Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; The Chesapeake and Ohio Railway Company of Indiana; The Chicago and Alton Railroad Company, and William W. Wheelock and William G. Bierd, Receivers; Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis & Louisville Railway
256 Company; Chicago Junction Railway Company; Chicago, Milwaukee and St. Paul Railway Company, and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers; The Chicago, Rock Island and Pacific Railway Company; Chicago, Terre Haute & Southeastern Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Grand Trunk Western Railway Company; Illinois Central Railroad Company; Indiana Harbor Belt Railroad Company; The Michigan Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; New York Central Railroad Company; New York, Chicago & St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; The Toledo, St. Louis & Western Railroad Company, and J. Frank Johnson and Harry A. Dunn, Receivers; and Wabash Railway Company, all of which railroads and systems of transportation were operated and controlled by the predecessors in office of said Andrew W. Mellon during the period of Federal control of railroads, to-wit: December 28, 1917, to March 1, 1920; that all of said railroad companies and corporations last named have and during said period of Federal control had systems of transportation and roads running through the Eastern Division of the Northern District of Illinois, with the exception of The Toledo, St. Louis & Western Railroad Company, and J. Frank Johnson and Harry A. Dunn, Receivers, which railroad company is now a part of the system of the New York, Chicago & St. Louis Railroad Company, and which system has a road running through the Eastern Division of the Northern District of Illinois; that said last-mentioned tariff, to which said railroads were parties, provided that the sum of twenty-five cents (25c) for unloading each car of
257 live stock and fifty cents (50c) for loading each car of live stock would be absorbed and paid by said railroad

companies, respectively, to said Union Stock Yard and Transit Company on all cars of live stock loaded or unloaded by that company at said Union Stock Yards and shipped into said Union Stock Yards by said railroads; that said last-mentioned tariff was and is known as Agent L. A. Lowry's Tariff 20-J, I. C. C. No. 87, and supplements thereto.

That effective May 21, 1917, the defendant the Union Stock Yard and Transit Company, filed with said Interstate Commerce Commission its tariff I. C. C. No. 2, whereby it increased said charges from twenty-five cents (25c) per car for unloading to fifty cents (50c) per car for unloading, and from fifty cents (50c) per car for loading to seventy-five cents (75c) per car for loading; that no tariff was filed with said Interstate Commerce Commission by said railroads absorbing said increase in said unloading and loading charges, and therefore all shippers and receivers of live stock were, after May 21, 1917, compelled to pay and did pay to said defendant the Union Stock Yard and Transit Company and to said railroads said increase in the charge, viz.: twenty-five cents (25c) per car for unloading and twenty-five cents (25c) per car for loading, in accordance with said increase created by said tariff I. C. C. No. 2 filed as aforesaid with said Interstate Commerce Commission by said defendant Union Stock Yard and Transit Company; that effective with the taking over of said railroads under federal control on December 28, 1917, all shippers and receivers of live stock to and at said Union Stock Yards were compelled to and did pay to the respective Directors Generals of Railroads appointed by the President of the
258 United States in accordance with the law, the said increase of twenty-five cents (25c) per car for unloading and the said increase of twenty-five cents (25c) per car for loading; that during the said period from December 28, 1917, to March 1, 1920, the stock yards of the said defendant the Union Stock Yard and Transit Company were the terminals of the predecessors in office of the said defendant Andrew W. Mellon in each of the shipments of live stock hereinafter referred to and on which the sum of fifty cents (50c) per car was exacted for unloading and the sum of seventy-five cents (75c) per car was exacted for loading; that upon the filing by said Union Stock Yard and Transit Company of its said tariff Supplement No. 1 to I. C. C. No. 6, there were filed with said Interstate Commerce Commission formal protests against said tariff, whereupon said Interstate Commerce Commission from time to time thereafter suspended the operation of said

tariff and set the matter down for hearing under its Investigation and Suspension Docket No. 1118.

That on or about October 2, 1917, the Chicago Live Stock Exchange, on behalf of its members and others engaged in the buying, selling and shipping of live stock to and at the Union Stock Yards at Chicago, Illinois, filed a complaint in writing with the Interstate Commerce Commission, alleging and charging said loading and unloading charges so fixed in said tariff I. C. C. No. 2, filed with said Interstate Commerce Commission by said defendant the Union Stock Yard and Transit Company and effective May 21, 1917, as aforesaid, to be unlawful, unjust and unreasonable under the Interstate Commerce Act; that the said Interstate Commerce Commission thereupon docketed said complaint under Interstate Com-
259 merce Commission Docket No. 9977; that the said carriers hereinabove specifically named, which were made defendants in said Case No. 9977 before said Interstate Commerce Commission, are the same carriers and railroads which are named in said petition filed in this court on the 8th day of December, A. D. 1928, as aforesaid; that said corporate carriers and railroads filed their answers to said complaint in said case No. 9977 before said Interstate Commerce Commission and the issues in said case were duly made; that said case Docket No. 9977 and said case Investigation and Suspension Docket No. 1118 were thereafter, by appropriate proceedings, duly consolidated before said Interstate Commerce Commission for hearing; that thereafter a full hearing was had with reference to said cases on or about February 11, 1919, at which hearing representatives of said Chicago Live Stock Exchange and of said corporate carriers and railroads were present and participated therein; that thereafter said Interstate Commerce Commission issued its report and decision in said consolidated cases and dismissed said complaint; said report and decision being reported in 52 I. C. C. 209, attached to the petition heretofore filed in this court on the 8th day of December, A. D. 1928, and therein designated Exhibit "C" to said petition and being made a part of said petition; that on or about April 14, 1919, upon petition of the complainant in said complaint Docket No. 9977 for rehearing and application to amend its complaint by making the Director General of Railroads a party defendant, the said Interstate Commerce Commission issued an order in said Docket No. 9977 and said Investigation and Suspension Docket No. 1118, in words and figures as follows:

260 "Supplemental Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 14th day of April, A. D. 1919.

No. 9977.

Chicago Live Stock Exchange

vs.

The Atch on, Topeka & Santa Fe Railway Company, *et al.*
Investigation and Suspension Docket No. 1118.

In the Matter of the Investigation and Suspension of Live Stock Loading and Unloading Charges at Chicago, Ill.

Upon further consideration of the records in the above entitled proceedings, of petition for rehearing filed by the Chicago Live Stock Exchange and Union Stock Yard and Transit Company, and of application of the Chicago Live Stock Exchange to amend its complaint by making the Director General of Railroads a party defendant:

It Is Ordered, That these proceedings be, and they are hereby, reopened for further hearing, on the question of the amount of the loading and unloading charges for live stock at the Chicago stock yards, and the amount of such charges, if any, that should be imposed upon shippers of live stock, or should be absorbed by the defendants and whether the Chicago Stock Yards are terminals of the Chicago Junction Railway Company, and whether the tariff arrangements between the Union Stock Yard & Transit Company and the other defendants with respect to the delivery and handling of live stock at the Union Stock Yards in Chicago are in compliance with the act.

It Is Further Ordered, That the petition of the Union Stock Yard & Transit Company, so far as it seeks a reopening of the case for the purpose of reconsideration of the finding that it is a common carrier, be, and it is hereby, denied.

It Is Further Ordered, That Walker D. Hines, Director General of Railroads, be, and he is hereby made an additional party respondent herein.

It Is Further Ordered, That a copy of this order be served upon each of the parties to these proceedings.

And It Is Further Ordered, That there proceedings be, and

they are hereby assigned for further hearing on May 30,
261 1919, ten o'clock a. m., at United States Court Room,
Chicago, Illinois, before Examiner Gerry.

By the Commission:

GEORGE B. McGINTY,
(Seal) *Secretary.*"

That thereafter said consolidated case, Docket No. 9977, and said Investigation and Suspension Docket No. 1118, duly consolidated as aforesaid, were reheard by said Interstate Commerce Commission, the said Director General of Railroads being duly represented and taking an active part in said proceedings; that thereafter, on or about July 15, 1920, said Interstate Commerce Commission issued its report on further hearing reported in 58 I. C. C. 164, and found that the said unloading and loading charges were unlawful and in violation of the Interstate Commerce Act, said decision and report being attached to the said petition heretofore filed in this court in this cause and there designated Exhibit "B" and made a part of said petition by reference; that on February 25, 1921, there was duly filed with said Interstate Commerce Commission a petition or complaint for reparation on behalf of upwards of 174,000 shippers of live stock who had been damaged by the assessment and collection of said loading and unloading charges hereinabove set forth in the amount of such charges paid for them; that said complaint was given Interstate Commerce Commission Docket No. 12614; that said complaint for reparation was filed by the above-named plaintiffs, or their legal predecessors, who were members of said Chicago Live Stock Exchange between the dates of December 28, 1917, and February 28, 1920, when said excessive and unreasonable loading and unloading charges were paid.

That said petition or complaint for reparation was filed jointly by the above-named commission merchants and
262 members of said Chicago Live Stock Exchange as representatives of said shippers of live stock numbering upwards of one hundred seventy-four thousand (174,000), and whose names were contained in Appendix A attached to said complaint for reparation filed with said Interstate Commerce Commission; that although in said proceedings for reparation before said Interstate Commerce Commission the above-named commission merchants and members of said Chicago Live Stock Exchange acted jointly with each other, each of the above-named commission merchants and members of said Chi-

cago Live Stock Exchange in said proceedings respectively presented and represented the claims of the particular shippers of live stock whom they had previously represented and acted for as commission merchants in the various shipments of live stock made between December 28, 1917, and February 28, 1920, and upon which said unreasonable and unlawful loading and unloading charges were made; that in each instance where said unreasonable and unlawful loading and unloading charges were made, the same were paid to said corporate carriers and railroads, or the liability to pay the same was primarily and directly assumed by said commission merchants and members of said Chicago Live Stock Exchange and in the first instance paid out of the individual funds or moneys of said commission merchants and members of said Chicago Live Stock Exchange and charged back against said individual shippers or deducted from the proceeds due to said individual shippers from said shipments, with the representation and assurance by said commission merchants and members of said Chicago Live Stock Exchange that they, in behalf of said shippers, would present to said Interstate Commerce Commission a claim for reparation for the use and benefit of said shippers; that said proceedings for reparation be-
263 fore said Interstate Commerce Commission were prosecuted by the above-named commission merchants and members of said Chicago Live Stock Exchange, on the theory that each of said members of said Chicago Live Stock Exchange doing business in said Union Stock Yards as commission merchants was seeking reparation in a representative capacity for the use and benefit of the particular shippers of live stock who, during said period between December 28, 1917, and February 28, 1920, had shipped stock to such member, and which member in the first instance paid said excessive and unlawful loading and unloading charges on shipments made by the particular customer shippers to such member, and primarily paid or assumed by said member and charged back to said individual customer shippers as aforesaid; that in said proceedings for reparation before said Interstate Commerce Commission said Interstate Commerce Commission proceeded on the theory and basis that each of said individual members of said Live Stock Exchange whose names are hereinabove mentioned and set forth in paragraph 2 of the petition herein, were seeking reparation as representatives of and for the use and benefit of the particular shippers whom they severally represented in said shipments of live stock made between De-

cember 28, 1917, and February 28, 1920, and whose identity was and is shown by the list of names of shippers set forth in Appendix A in said proceedings for reparation before said Interstate Commerce Commission, for the purpose of making said shippers, numbering upwards of one hundred seventy-four thousand (174,000), as aforesaid, parties to the record in said Interstate Commerce Commission proceedings; that said list of shippers so filed was duly registered and accepted by said Commission, as will more fully appear by the decisions, opinions and reports of said Interstate Commerce Commission in said reparation proceedings referred to and made
264 a part of said petition heretofore filed in this court in the above entitled cause as aforesaid; that in said proceedings for reparation said Interstate Commerce Commission awarded reparation to each of said members of said Chicago Live Stock Exchange doing business in said Union Stock Yards as commission merchants, for the aggregate amount of the excessive loading and unloading charges primarily paid and assumed as aforesaid by each member on account of shipments made to such member by the particular shippers of live stock represented in said shipments by such member, as will more fully appear from the order of said Commission in said consolidated cases Nos. 9977 and 12614, said order bearing date the 12th day of December, A. D. 1927, a true and correct copy thereof being attached as Exhibit "A" to said petition filed in this court in the above entitled cause and made a part of said petition by reference and to the same extent and as fully as though the same were therein set out.

Plaintiffs represent that in the said proceedings hereinabove set forth before the said Interstate Commerce Commission they, and each of them, well knew that in the records and files in said proceedings before said Interstate Commerce Commission, as well as by verbal statements and representations made in said proceedings before said Interstate Commerce Commission by the attorneys and representatives of these plaintiffs, it was expressly stated and set forth that they were acting for and on behalf of the several individual shippers whom they respectively represented in said shipments and whom they jointly represented in said proceedings for reparation before said Interstate Commerce Commission and in the capacity of trustees of an express declared trust in favor of and for the use and benefit of the respective shippers

whom they represented in said shipments and whom they
265 represented in said proceedings for reparation before said Interstate Commerce Commission, and that they, and each of them, well knew that said individual shippers had knowledge of said proceedings before said Interstate Commerce Commission and acquiesced in the representation of their said several claims for reparation by said plaintiffs. Wherefore, plaintiffs represent that by operation of law they became and now are trustees of an express trust, with the duty and obligation of enforcing in this court, in their respective representative capacity, for the use and benefit of the individual shippers whom they severally represented in said shipments and whom they represented in said proceedings for reparation before said Interstate Commerce Commission, the award of reparation made to them, as hereinafter set forth, by said Interstate Commerce Commission, in the sum of One Hundred Forty Thousand and One Dollars and Twenty-five Cents ($140,001.25), as representatives of and for the use and benefit of said individual shippers, and in that capacity they bring this suit.

3. Strike from said petition paragraph 8, paragraph 9, paragraph 10, paragraph 12, paragraph 13, paragraph 14 and paragraph 16 thereof, found on pages 13 to 19, inclusive.

4. Strike from said petition paragraph 17, on pages 19 and 20 of said petition, and insert in lieu thereof the following:

(17) Plaintiffs further represent that in said consolidated cases Nos. 9977 and 12614, these plaintiffs, or their legal predecessors, represented before said Interstate Commerce
Commission the rights and interests of said shippers,
266 numbering upwards of one hundred seventy-four thousand (174,000), as hereinabove set forth; that said Interstate Commerce Commission in said consolidated cases Nos. 9977 and 12614, held public meetings, at which meetings evidence was heard and taken in said causes, and at which hearing said defendants were represented; that after said public hearings had been fully completed and said consolidated causes fully argued by representatives of all of said parties in interest, said Interstate Commerce Commission, on or about June 2, 1925, issued its consolidated decision and report in said causes, in which it found that the loading and unloading charges above referred to and described were unjust and unreasonable, and that reparation, with legal interest, should be made by said defendants on account of the collection by said defendants of said unjust and unreasonable

charges, which said decision and report is reported in 100 I. C. C. 266, a copy thereof being hereto attached, marked Exhibit "D", and made a part hereof as though the same were fully set forth in this petition.

SIMS GODMAN & STRANSKY,
Attorneys for Plaintiffs.

EDWIN W. SIMS,
ELWOOD G. GODMAN,
FRANKLIN J. STRANSKY,
CLAIR R. HILLYER,
Of Counsel.
Continental Illinois Bank Building,
Chicago, Illinois.

267 And afterwards, to wit, on the 18th day of April 1930, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit: Entered 1930.

268 * * (Caption) * *

Friday, April 18, 1930.

Present: Honorable Charles E. Woodward, Judge of Said Court.

This cause coming on to be heard upon the motion to vacate the orders heretofore taken and entered herein of record January 28, A. D. 1930 and after arguments of counsel said motion is taken under advisement.

269 And on, to wit, the 31st day of July, 1930 there was filed in the Clerk's office of said Court a certain Memorandum by Judge Woodward in words and figures following, to wit:

uly 31, 270 * * (Caption) * *

MEMORANDUM.

July 31, 1930.

WOODWARD, *District Judge*:

This suit was instituted by plaintiffs, 103 in number, members of the Chicago Life Stock Exchange, to recover reparations awarded by the Interstate Commerce Commission. The suit was brought in the individual names of the commission men seeking to recover reparations in their individual capacity. The money sued for, if recovered in this suit, would have been the individual moneys of the several plaintiffs. The moneys, if recovered, could have been applied to their use and benefit without any legal obligation on their part to account for and pay over any part thereof to the individual shippers. The theory on which the case was tried, in conformity with the petition, was that the several commission men were the real parties in legal interest and had the right to maintain the suit.

The case came on for trial before a jury. The evidence was voluminous. The trial consumed three or four weeks. At the conclusion of the evidence all defendants separately made motions for a directed verdict. The motions were argued by counsel on both sides at such length and were taken under advisement, by the court. The court sustained the several
271 motions for a directed verdict and in support of its position filed a lengthy opinion. In allowing the motions the court concluded in effect that the 103 commission men were without legal interest in the proceeding and were not demnified. In its opinion the court suggested that the persons who were really demnified, assuming that the order of reparations was not subject to attack, were the 174,000 shippers of live stock who had paid the alleged unreasonable charge. The court, in its opinion, gave no expression on the other points urged by the respective defendants in support of their motion for a directed verdict.

Pursuant to the direction of the court, a verdict finding the issues for the defendants, was returned. Motions for a new trial and in arrest of judgment were, respectively, overruled and judgment was entered in favor of the defendants

and against the plaintiffs for costs, from which an appeal was prayed and allowed. At the same term of court at which the judgment was entered, plaintiffs appeared and on January 31, 1930 moved to vacate and set aside the following orders in this cause, to-wit:

"Order denying and overruling plaintiffs' motion for a new trial;

Order overruling and denying plaintiffs' motion in arrest of judgment;

Judgment on the verdict in favor of defendants and against plaintiffs and against plaintiffs for costs;

Orders allowing appeal, fixing time for bill of exceptions and amount of cost bond."

The above and foregoing motion was set down for hearing and was heard, the respective parties presenting both orally and in writing elaborate arguments both for and against the allowance of such motion.

On April 11, 1930 plaintiffs appeared and moved for leave to amend their petition heretofore filed in this cause on December 8, 1929 and with the motion tendered the proposed amendment. The proposed amendment strikes out that part of the original petition in which the suit was started in 272 the individual names of the plaintiffs and substitutes therefor a suit by the present commission men as trustees of an express trust. By the proposed amendment the plaintiffs seek to recover on a cause of action in favor of the 174,000 shippers on the theory that the plaintiffs maintain a trust relation with the shippers and are seeking to recover on the ground that the shippers and not the commission men are and will be the beneficiaries of any recovery made. There is the further theory that the proposed amendment is merely formal and is intended to make the petition correspond with the proofs.

"Federal courts are very liberal in allowing amendments to prevent a miscarriage of justice."

Quaker City Cab Co. v. *Fixter,* 4 Fed. (2d) 327.

The courts prefer to try the case on its merits rather than on questions of practice. Where an amendment can be made, either before or after judgment, to make the allegation conform with the proof without changing the form of action, or doing any substantial damage to any party in interest, it should be allowed.

The court hesitated to base its holding on the ground that the plaintiffs could not maintain this suit. It was reluctant

to rest its decision on a point where it might be said that the court was taking a narrow and super-critical view of a case involving the magnitude of interests as this one does. But the point on which the decision rested was pressed with much vigor, earnestness and sincerity. It could not be evaded. It lay at the very threshhold of the inquiry. The court was of opinion that the point was well taken. As it was decisive of the controversy, the court expressed no opinion on the other matters urged with equal earnestness and sincerity.

The plaintiffs were not taken by surprise at the position assumed by the defendants. The right of the plaintiffs to maintain the suit had been repeatedly challenged before the Interstate Commece Commission. After repeated challenges before the commission as to their authority to maintain the claim
273 for reparations, the plaintiffs persistently and consistently maintained before the commission, as they did in the petition filed in this court, that they had the right to maintain the suit in their individual names and to collect and apply the amount recovered to their individual uses. Counsel for the Director General has furnished the court with a memorandum, which the court assumes to be correct, containing a transcript of statements made before the Interstate Commerc Commission relative to the theory of the plaintiffs. The memorandum so furnished reads as follows:

"THEORY OF PLAINTIFFS.

On page 27 of testimony, beginning October 3, 1922, Mr. Hillyer stated:

> 'The theory on which this is being tried is that these people are the factors and agents of these principals; that they have title to the property; that they can sell it in their names; they can sue and be sued for it in connection with it; they are liable for all of these charges legally, and that they have every right to come in here and collect this money as factors in their own right.'

On page 236 of the testimony, beginning October 3, 1922, Mr. Hillyer stated:

> 'I had better correct your impression of that right of agency, Mr. Towner, because that is not the basis of our case at all. The basis of our case is that these people have a legal right to collect this money under the decisions of the Commissions and the courts, and that it is not necessary for them to disclose here what they are going to do with it after they get it.'

Mr. Towner replied:

'Is it your theory for my information, that these complainants would have the legal right not only to recover reparation but to retain it?'

And Mr. Hillyer answered "yes".

On page 237, following the foregoing, Mr. Hillyer, in response to suggestions of the examiner that he would understand assurances that the money collected would go to the shippers were given only on moral grounds, answered

"absolutely, we are simply laying our cards on the table as to what we are going to do with it when we get the money.'

On page 563 of the testimony taken October 3, 1922, Mr. Hillyer said:

274 'It is my view that legally these shippers, commission men, entitled to collect this money and keep it if they want to, but we are volunteering the information to the Commission that they do not intend to do it and that they intend to pay it back to the people who bore the charge and that is the policy of the exchange to its customers and is the testimony of the witness Moshier, who is chairman of the Traffic Committee of the Exchange in his sworn testimony before the commission that he is going to pay it back. But that has nothing to do with the legal rights in the case.'

Following further statement by Mr. Towner, Mr. Hillyer, on page 565, said:

'Just to bring this discussion to a close I will say we stand on our complaint in this case as to what we ask for in the complaint. We are not enlarging or contracting the issues as stated in the complaint.'

On page 93 of testimony taken July 14, 1921, Mr. Hillyer stated:

'You do not have to authorize the factor. He has such right of his own.'

Mr. Hillyer further stated:

'I might say on that point that these commission merchants are interested here as factors in this reparation the same as agents for the shippers and the commission has held that the factor has a right to reparation.'

The case was not tried before the Interstate Commerce Commission on the theory of any trust relationship. The plaintiffs—commission men—have claimed since the inception of the case before the Interstate Commerce Commission and un-

til the motion for the amendment was filed after judgment in this case, that they had a right to receive the recovery in their own right and to keep it. Their claim was that it was only a moral duty, which they stated would be performed by them to account for the recovery to the 174,000 shippers. Their intentions are laudable and are to be commended, but their intentions, altruistic as they are, create no legal obligations.

As stated, the Federal courts, are liberal in the matter of amendments. If an amendment can be allowed, even after judgment, without changing the cause of action, or without doing any substantial injury to any party in interest, the court will allow the amendment to be made.

275 The plaintiffs contend that the amendment tendered in this case is merely formal and does not involve any substantial change in the issues. The defendants, on the other hand, urge with much force that the proposed amendment sets up a new cause of action. If the contentions of the defendant are correct, the motions now under consideration should not be allowed.

The court is of opinion that the proposed amendment sets up a new cause of action. It is proposed to substitute in place of the present plaintiffs, who are seeking to recover in their individual capacities, 174,000 new beneficial plaintiffs who have not hitherto appeared in the suit.

The proposed amendment is not a formal affair but introduces a new cause of action in favor of new plaintiffs. The court has read and studied the cases cited by plaintiffs in support of their proposition that the amendment should be allowed. The court, however, believes that the summary of such cases contained in the memorandum of counsel for the defendant Union Stock Yard and Transit Company is a fair and just summary and is adopted by the court as follows:

> "It will thus be observed that in all the cases on this subject, including some not cited by plaintiffs, amendments were permitted *only because the real plaintiff in the case remained the same. In every instance, any money recovered as a result of the suit would go to the same party, both before the amendment and after the amendment.* Under these circumstances the amendments permitted obviously went only to form. As we have pointed out, the situation is different here, for the reason that as the case now stands the commision men, who are named as plaintiffs, sue in their own name and on their own behalf, with no legal obligation to report to anybody. Under the proposed amendment, however, they will not be the bene-

ficiaries of any recovery, but, on the contrary, the shippers who have not appeared in this case up to now, and are now proposed to be introduced for the first time, will receive the benefit of any judgment. These circumstances make the proposed amendment one which goes to the substance of the case."

On this branch of the case the court concludes that the amendment introduces a new cause of action.

It is further to be observed that the Interstate Commerce Commission made no award in favor of the shippers. The most that can be said is that the award of the Interstate Commerce Commission was to the commission men in their
276 own names and in their own behalf or as factors and agents for the shippers. By no construction of the language of the award can it be concluded that the award was made to the commission men as trustees, either of the shippers or of anyone else. Such trusteeship does not result, as the cout pointed out in its opinion, from their position as factors. The commission brought suit in the capacity in which the award was sought and made. They now seek to bring suit in a capacity other than that in which the award was made. This they cannot do.

If the conclusion of the court is correct, that a new cause of action is sought to be introduced by the proposed amendment, then it must show that under Paragraph F, Section 16 of the Act to Regulate Commerce which reads:

"A petition for the enforcement of an order of the commission for the payment of money shall be filed in the District Court, or the state court, within one year from the date of the order, and not after,"

that the proposal to make this a suit by 174,000 shippers is barred by the statute. The statute not only bars a recovery, but destroys the right to sue.

Phillips v. *Grand Trunk Ry.* 236 U. S. 662;
Kansas City Southern Ry. Co. v. *Wolfe,* 261 U. S. 133;
Danzer v. *G. & S. I. R. R.* 268 U. S. 633.

The court feels that it could not allow these motions without doing substantial damage to the defendants. This litigation has been pending, before the Interstate Commerce Commission and in this suit, for more than twelve years. Plaintiffs have had notice of the defense on which the court based its opinion during all that time. The position of the plaintiffs was repeatedly challenged before the Interstate Commerce

Commission. In the face of such challenges the plaintiffs maintained that their position was sound. The defendants during all this time have been compelled to litigate the matter and have expended large sums of money and have devoted enormous amounts of time. To reopen the case, as proposed by the amendments, would be again to involve the expenditure of an incalculable amount of money as well as to consume much time. The plaintiffs have had their "day in court" 277 and have presented the whole record. The court, in its decision, expressed no opinion as to other issues involved. The appeal is from the judgment of the court and not from its opinion. The court may have assigned a wrong reason for the judgment. While the court, in its opinion, did not advert to the other points argued by the defendants, yet it seems to the court that on other grounds, not referred to in the opinion, the judgment of the court may be maintained. Viewed in any light the court cannot see that in justice to all parties in interest, as well as in justice to the court, the amendments should not be allowed.

Accordingly, the court denies the motions to vacate and set aside the orders heretofore entered on January 28, 1930 and denies the petition of plaintiffs to amend the original petition in this case.

ly 31, 278 And afterwards, to wit, on the 31st day of July, 1930, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

279 * * (Caption) * *

Thursday, July 31, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

It Is Ordered by the Court that the plaintiffs' motion filed January 31, 1930 to vacate and set aside certain orders and judgments entered January 28, A. D. 1930 be and the same is hereby overruled to which ruling of the Court the plaintiffs by their attorneys here and now duly except.

It Is Further Ordered that the plaintiffs' motion filed April 11, A. D. 1930 to amend the original petition filed in said cause

be and the same is hereby overruled to which ruling of the court the plaintiffs by their attorneys here and now duly except.

It Is Further Ordered that the time for filing bill of exceptions be and the same is hereby extended to October 6, A. D. 1930 and the time for filing appeal bond be and the same is hereby extended to September 22, A. D. 1930.

280 And afterwards, to wit, on the 28th day of August, 1930, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit: Entered Aug. 1930.

281 * * (Caption) * *

ORDER.

It is hereby ordered that the order entered July 31, 1930, in the above-entitled cause, be and the same is hereby amended to read as follows:

Motion of plaintiffs filed January 31, 1930 to vacate and set aside certain orders and judgments entered January 28, 1930 overruled—exception by plaintiff. Motion of plaintiffs filed April 11, 1930 to amend the original petition in this cause overruled—exception by plaintiffs. Appeal by plaintiffs prayed and allowed to the Circuit Court of Appeals for the Seventh Circuit on filing an appeal bond in the sum of Five Hundred Dollars on or before September 22, 1930. Bill of Exceptions to be filed October 6, 1930.

CHARLES E. WOODWARD.
Judge.

Dated August 28, 1930.

319 And afterwards, to wit, on the 29th day of September 1930, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

ed Sept. 29, 30.

320 * * (Caption) * *

Monday, September 29, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

On motion of plaintiffs attorneys It Is Ordered that the time within which the plaintiffs are to file Bill of Exceptions herein be and the same is hereby extended from October 6, A. D. 1930 to Octover 25, A. D. 1930.

f Excep- s filed Oct. 1930.

321 * * (Caption) * *

BILL OF EXCEPTIONS.

Filed Oct. 24, 1930, Charles M. Bates, Clerk.

322 * * (Caption) * *

Be It Remembered, That heretofore, to-wit, on the 6th day of January, A. D. 1930, being one of the regular days of the December, A. D. 1929, term of said court, this cause came on for hearing before the Honorable Charles E. Woodward, one of the Judges of said court, and a jury, upon the pleadings filed herein.

Present.

Messrs. Sims, Godman & Stransky, by Elwood G. Godman, Esq., Clair R. Hillyer, Esq., Representing the Plaintiffs.

Sidney F. Andrews, Esq., A. R. McLaughlin, Esq., Representing Andrew W. Mellon, Director General of Railroads.

Messrs. Winston, Strawn & Shaw, by Frank H. Towner, Esq., Representing Union Stock Yards & Transit Company.

323 And thereupon, to sustain the issues in their behalf, the plaintiffs offered the following evidence:

Mr. Godman: We desire, if the Court please, to offer in evidence as Plaintiffs' Exhibit 1, the opinion and decision of the Interstate Commerce Commission in Investigation and Suspension Docket No. 1118 and No. 9977, *Chicago Live Stock Exchange* v. *Atchison, Topeka and Santa Fe Railway, et al.*

The Court: Yes, it is admitted.

Whereupon said document marked Plaintiffs' Exhibit 1 was received in evidence, and is in the words and figures following, to-wit:

324 PLAINTIFFS' EXHIBIT 1. Plaintiffs hibit 1

ADP

5594

INTERSTATE COMMERCE COMMISSION.

Investigation and Suspension Docket No. 1118.

Live Stock Loading and Unloading Charges.

No. 9977.

Chicago Live Stock Exchange

vs.

Atchison, Topeka & Santa Fe Railway Company *et al.*

Submitted October 9, 1918. Decided February 11, 1919.

Upon the facts of record, Held, That—

1. The Union Stock Yard & Transit Company of Chicago is a common carrier engaged in interstate commerce and subject to the provisions of the act to regulate commerce.

2. The notice of cancellation of its tariff of charges for

loading and unloading live stock, in carloads, at the Chicago stockyards has not been justified.

3. The loading and unloading of live stock, in carloads, at the Chicago stockyards is a duty of the shipper.

4. The loading and unloading of live stock, in carloads, at the Chicago stockyards may be assumed by the carriers in those instances in which their convenience is aided and their equipment conserved by so doing.

5. The loading and unloading service performed by the Union Stock Yard & Transit Company is for the benefit of the shipper, but tends also to the convenience of the line-haul carriers.

6. In the absence of a showing of undue prejudice how much, if any, of the loading and unloading charges at the Chicago stockyards may properly be absorbed by the line-haul carriers is dependent upon the degree to which their interests are served in any particular instance.

7. The failure to absorb all of the charges for loading and unloading live stock at the Chicago stockyards, while absorbing all such charges at certain other markets, has not been shown on this record to produce undue prejudice against shippers of live stock at the Chicago stockyards.

8. The Chicago stockyards are the terminals for receipt and delivery of live stock of the railroad utilizing them.

Harry C. Barnes and Sims, Welch & Godman for complainant.

S. H. Cowan for National Live Stock Shippers Protective League and American National Live Stock Association; Clifford Thorne for National Live Stock Shippers League and Cornbelt Meat Shippers Association; R. D. Rynder for Swift & Company; and Ralph M. Shaw and George M. Kelly for Union Stock Yard & Transit Company of Chicago.

T. J. Norton, D. P. Connell, William W. Colin, jr., Kenneth F. Burgess, J. N. Davis, J. G. Love, W. E. Bush, W. N. King, W. F. Dickinson, F. A. Adams, Robert H. Widdicombe, and A. P. Humburg for defendants.

Report of the Commission.

By the consent of all parties, the above-named cases, which are related, have been consolidated and will be disposed of in one report.

By tariff, filed to become effective on May 21, 1917, the

Union Stock Yard & Transit Company of Chicago, hereinafter called the stockyard company, increased its charge for unloading and loading cars of live stock at the stockyards of Chicago from 25 and 50 cents per car to 50 and 75 cents per car, respectively. The various railroads that deliver and accept shipments of live stock at the stockyards had for many years either borne or absorbed the entire charges of the stockyard company for this service, and when these charges were increased an attempt was made by the stockyard company to collect the increased charges from the line haul carriers. This increased charge the carriers refused to pay, with the result that the carriers increased their freight bills by the amount of the increased charges, and the stockyard company collected and retained such charges from the shippers. Effective September 1, 1917, the stockyard company filed with the Commission a cancellation notice, as follows:

Effective September 1, 1917, U. S. Y. & T. Co., tariff No. 3, I. C. C. No. 6, will be withdrawn and canceled. The loading and unloading platforms of the Union Stock Yard & Transit Company of Chicago will in future be used or available for use by the railways entering Chicago and using them as terminal stations, under operating arrangements.

Certain shippers of live stock at the Chicago stockyards protested against the proposed cancellation, and the cancellation notice was suspended by appropriate orders until June 30, 1918.

The salient facts in the history of the stockyard company are as follows:

Prior to 1865 there were four different points in the city of Chicago at which live stock was delivered and marketed. In that year the railroads then entering Chicago organized a company to be known as the Union Stock Yard & Transit Company. The stock in this company was very largely taken by the Chicago railroads. The company was created by a special act of the legislature of the state of Illinois, approved February 13, 1865. The company was entitled to engage in many activities. Chief among the rights secured were:

325 (a) The right to construct the necessary buildings, railway tracks, and loading and unloading platforms for the accommodation of the business of a general union stockyard for cattle and other live stock.

(b) The right to construct, maintain, and operate a rail-

way from the grounds that might be selected for its yards so as to connect with the tracks of all the railroads which terminated at Chicago.

Accordingly the stockyards were constructed and the railway was built. The stockyard company performed the loading and unloading of cars of live stock from the beginning of its operation. The loading charge of 50 cents and the unloading charge of 25 cents per car was established by the board of directors of the stockyard company on April 18, 1867. Up to January 1, 1919, these charges were either borne or absorbed by the respective railroads that performed the line haul. Carriers hauling live stock to Chicago moved the cars with their own power and crews over the tracks of the stockyard company to the unloading platform. No charge was apparently made against the line haul carriers for the use of the tracks for the transportation of these cars to the unloading platforms until 1894. Prior to that year the various railroads which had owned shares in the stockyard company disposed of their holdings. In 1894 a charge was made against the railways using these tracks which was assessed on a per car basis and varied to some extent with the length of the haul.

In 1897, the stockyard company leased all of its railroad property for a period of 50 years to an Illinois corporation, known as the Chicago & Indiana State Line Company, now known as the Chicago Junction Railway Company. The lease covered all its railways and tracks, the stock yard company retaining for itself the loading and unloading platforms and yards. Under this lease the stockyard company received two-thirds of the profits derived by the lessee from the operation of the railroad. There was also organized at a date not stated in the record a holding company, which appears to have been called an investment company, known as the Chicago Junction Railway & Union Stock Yards Company of New Jersey, which owned a majority of the stock of the stockyard company and the Chicago Junction Railway.

Subsequent to the assessment of the trackage charge for the use of the tracks leading from the trunk lines to the stockyards, the railroads continued to receive and deliver shipments of live stock, in carloads, at the stockyards and transport them with their own locomotives and crews over the tracks of the Chicago Junction Railway. They, however, soon published a tariff containing a switching charge of $2 per car for the service of switching cars between the stock-

yards and points on their own lines. This increased the total rates from points of origin to the stockyards by $2 per acre. Complaint arose regarding the amount of the switching charge and was dealt with by us in *Cattle Raisers Asso.* v. *F. W. & D. C. R. R. Co.*, 7 I. C. C., 13; *Cattle Raisers Asso.* v. *C., B. & Q. R. R. Co.*, 11 I. C. C., 277 and 12 I. C. C., 507. The switching charge was held by us to be unreasonable, but this conclusion was not sustained by the courts to which appeal was taken.

In 1911, an action was brought in the Commerce Court to compel the stockyard company and the Chicago Junction Railway to file with the Interstate Commerce Commission tariffs in conformity with section 6 and reports and statements in conformity with section 20 of the act to regulate commerce. The Commerce Court there held, 192 Fed., 330, that the Chicago Junction Railway was a common carrier engaged in interstate commerce and subject to the provisions of sections 6 and 20 of the act to regulate commerce. The court also held that the owner of a railroad, which is leased and operated by a lessee as a common carrier engaged in interstate commerce, may be required to make annual reports to the Interstate Commerce Commission; that a stockyard company which receives live stock from carriers at its yards, pens, feeds and cares for the same, and maintains a public market for its sale, and which unloads and reloads it when required, receiving fixed prices for its services is not a common carrier within the meaning of the act to regulate commerce; that the term "common carrier" as used in the act is to be given its ordinary meaning of one engaged in the actual work of transportation; and a corporation not so engaged is not within the act merely because it is authorized by its charter to engage in such business. It is also stated that:

A stockyards company, authorized by its charter to build and operate a railroad and which did build and operate one in interstate commerce, on leasing its line and equipment for a term of years to an independent operating company, ceased to be a "common carrier" engaged in interstate commerce within the meaning of the interstate commerce act, * * * and is not subject to the provisions of the act as such, because it receives as rental a share of the net earning of its road; nor because the owner of a majority of the stock also owns a majority of the stock of the lessee. * * * A holding company is not a common carrier within the meaning of the

interstate commerce act because of the fact that it owns all of the stock of a corporation which is such a common carrier.

An appeal was taken to the Supreme Court of the United States. In the opinion of the Supreme Court, 226 U. S., 286, the Commerce Court was upheld in its conclusion that the Chicago Junction Railway was a common carrier and subject to the provisions of sections 6 and 20 of the act to regulate commerce, but the conclusion of the Commerce Court relative to the stockyard company was reversed. In reference to these two companies the Supreme Court stated on page 306:

> We think that these companies, because of the character of the service rendered by them, their joint operation, division of profits, and their common ownership by a holding company, are to be deemed a railroad within the terms of the act to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that act. It is the manifest purpose of the act to include interstate railroad carriers, and by its terms the act excludes transportation wholly within a state. In view of its purpose and so construing the act as to give it force and effect, we think the stock yard company did not exempt itself from the operation of the law by leasing its railroad and equipment to the junction company, for it still receives two-thirds of the profits of that company and both companies are under a common stock ownership with its consequent control. We therefore think the Commerce Court was right in holding that the junction company should file its rates with the Interstate Commerce Commission and that it should also have held the stock yard company subject to the provisions of the interstate commerce acts.

326

On pages 304 and 305 of the decision, the court stated:

> The fact that the performance of the service is distributed among different corporations having common ownership in a holding company which controls an interstate system was held in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission, supra* [219 U. S., 498], to make no difference, where the service to be performed was a part of the carriage of freight by railroad in interstate commerce commission. Nor does it make any difference that neither the junction company nor the stockyard company issues through bills of lading. It is the character of the service rendered, not the manner in which the goods are billed, which determines the interstate character of the service. *Southern Pacific Terminal*

Co. v. *Interstate Commerce Commission, supra; Ohio R. R. Comm.* v. *Worthington,* 225 U. S. 101.

Together, these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars, and transport it for a substantial distance upon its journey in interstate commerce, under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal service rendered by the two companies, and complete its delivery to the consignee. They are common carriers because they are made such by the terms of their charter; hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems which use them.

Subsequent to the decision of the Supreme Court the stockyard company filed a tariff with the Interstate Commerce Commission showing its charges for loading and unloading live stock. In 1913, it canceled its lease to the Chicago Junction Railway and entered into a lease by the terms of which it receives $600,000 per year for the use of its tracks in lieu of a two-thirds share in the net profits of operation theretofore received.

The services it renders in connection with shipments of live stock to and from the stockyards are reported to be as follows:

(a) The service of guaranteeing the railroad companies against loss arising out of the delivery of live stock without the surrendering of the bill of lading.

(b) The service of guaranteeing freight charges.

(c) The service of loading and unloading the freight.

(d) The service of notifying the consignees.

(e) The service of correctly tabulating the car numbers and contents of the car.

(f) The service of furnishing the weights to the carriers.

(g) The service of maintaining records as to dead and crippled animals and of maintaining records showing deliveries to "billed consignees."

(h) The service of furnishing the railroad companies terminal facilities for the receipt and delivery of live stock at Chicago.

The stockyard company contends that although it was held by the Supreme Court to be a common carrier as to some of

its activities it is not altogether certain that the court referred to the particular activities above described in connection with shipments of live stock. It is also contended that the relationship between the stockyard company and the Chicago Junction Railway has changed to some extent since the decision of the Supreme Court. The language of the court's description of the activities of the stockyard company is as follows:

After leasing its railroad property to the junction company, the stockyard company continued to operate its stockyard facilities for loading and unloading cattle and other live stock bound for and coming from points outside the state, and to feed and water live stock in transit over the lines of trunk-line carriers, and also to feed, bed, and water live stock shipped to consignees doing business in the stockyards district.

The employees of trunk lines bringing live stock to the stockyards turn over the waybills accompanying such shipments, with what are called "live-stock stubs" attached, to the employees of the stockyard company, who use the waybills in unloading and counting the stock, and the waybills and stubs are then sent to the auditor of the stockyard company (being also the auditor of the junction company) who retains the stubs and forwards the waybills to the local agents of the trunk lines. The stockyard company advances the charges on such shipments to the trunk lines and collects from the consignees, usually commission men, doing business at the stockyards, the moneys it has so advanced for their accommodation.

It is clear, therefore, that in holding the stockyard company a common carrier the court certainly had in mind the particular activities of that company with reference to shipments of live stock. The only difference as to the relationship then and now existing between the two companies is that then the Chicago Junction Railway held a 50-year lease with approximately 35 years to run and paid two-thirds of its profits to the stockyard company as rental, where as it now has a lease in perpetuity and pays $600,000 per year as rental. The character of service rendered has not changed. The complementary relation of the stockyard company to the Chicago Junction Railway Company is now as it was in 1912. The stock of both companies is owned by a holding company with control of both organizations, and it is of no more real conse-

quence to the actual owner of these companies which one
327 makes a profit than it is to a man in which pocket he carries his money. The relation of these two companies to each other and to the holding company controlling both and the respective services performed by each in connection with shipments of live stock can not now be held to be essentially different from the conditions existing in 1912. The inevitable conclusion is that the stockyard company is now, as to shipments of live stock to and from the stockyards, a common carrier engaged in interstate commerce and subject to the provisions of the interstate commerce act. Its tariff of charges relating to services performed in connection with shipments of live stock should be filed with this Commission. The notice of cancellation of its tariff of charges for loading and unloading live stock in carloads, at the Chicago stockyards has not been justified.

The Chicago Live Stock Exchange, the complainant in docket No. 9977, is made up of commission merchants and others engaged in the business of buying, selling, and shipping live stock at the Chicago stockyards. The stockyard company, the Chicago Junction Railway Company, and 27 other railways are made defendants.

The complaint asserts that it is unduly discriminative on the part of various carriers reaching other markets to absorb the entire loading and unloading charges at such markets and to refuse to absorb such charges in full at the Chicago stockyards; that it is as much the duty of the carrier to load and unload live stock as it is to haul it; that the method of compensating the stockyard company for its service in loading and unloading cars of live stock is a matter to be adjusted between that company and the trunk line carriers and that it should be made the basis of an operating agreement between the stockyard company and interested carriers and not the subject matter of published tariff arrangements which involve the shipping public. The complainant urges that if the stockyard company is not permitted to cancel its tariff, the line haul carriers should be required to publish appropriate amendments to their tariffs showing absorptions of the increased loading and unloading charges; that if the stockyard company is permitted to cancel its tariff, then the line haul carriers should be ordered to amend all their tariffs containing rates on live stock to and from the Chicago stock yards in such manner as to authorize the loading and unloading of cars at these yards without expense to the shipper. Reparation is

sought against the defendants on all shipments of live stock, in carloads, made by complainants to or from the Chicago stock yards since May 21, 1917, amounting to 25 cents per car, or such other sum as, in view of the evidence to be adduced, we might consider due.

An intervening petition was filed on behalf of Swift & Company and certain other corporations, and the National Live Stock Shippers' Protective League. The interveners asked for reparation of 25 cents per car on shipments loaded and unloaded for them at Chicago since the taking effect, on May 21, 1917, of the tariff filed by the stockyard company increasing by 25 cents per car the loading and unloading charges at the yards.

As stated, the complaint makes the broad assertion that it is the duty of the carriers transporting shipments of live stock, in carloads, to load and unload such shipments. In *National Lumber Dealers' Asso.* v. *A. C. L. R. R. Co.*, 14 I. C. C., 154, we had occasion to deal with the general practice obtaining throughout the country as to loading and unloading shipments of freight in carloads. At page 160 of this report we stated:

Ever since the inception of railroad transportation shippers have, generally speaking, loaded and their consignees have unloaded carload freight. This practice or custom arose naturally because it was the easiest, most economical, and satisfactory way of doing business. It is practically out of the question for railroads to provide men to load and unload carload freight at all points in the country. The shipper can load more satisfactorily and economically than anyone else. He is about to possess himself of effective appliances, where they can be used, to employ skilled men to properly load all carload traffic, whether shipped in closed or on open cars. For the same reasons consignees are the best fitted to unload shipments. For more than fifty years the loading by consignor and unloading by consignee has been a recognized rule of carload transportation, and this rule extends to and includes commodities which yield to carriers the largest part of their income.

While, as stated, the rule that shippers must load and unload carload freight is generally applied, there are exceptional instances in which this work is done by the carriers. An example is shown in *Davies* v. *L. & N. R. R. Co.*, 18 I. C. C. 540. In that case the complainant contended that it was the duty

of the carriers to load carload shipments of fruit and vegetables at their own expense. We there found, as stated in the syllabus:

Complainant's contention that it is the duty of defendants to load, strip, and brace carload shipments of fruit and vegetables at their own expense, for the reason that this service is included in the carload rate is not tenable, because the tariffs of the principal defendant provide that shippers shall load and unload carload shipments. The service of loading, furnishing material, and placing in the cars is an additional service over and above the transportation for which the carriers are entitled to receive reasonable compensation.

The soundness of the view that ordinarily it is the duty of the shipper to load and unload carload freight can not be questioned. What is there, then, respecting shipments of live stock in carloads that differentiates such shipments from that of other articles so clearly as to shift the responsibility and duty of loading and unloading from the shipper to the carrier?

Section 1 of the act to regulate commerce provides:

328 That the term "transportation" shall include all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

There is here, however, no attempt to particularize as between one variety of freight and another and to provide for a greater degree of responsibility or an added duty with respect to carload shipments of live stock than exists as to other freight. Section 1 further provides:

It is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this act upon just and reasonable terms.

In this portion of the section there is nothing stated which in any manner sets apart shipments of live stock from shipments of other freight unless it be that it is impracticable to secure their handling and delivery safely and promptly unless the carriers do the loading and unloading. The complainant relies largely upon an expression used by the Supreme Court in *Covington Stock Yards Co.* v. *Keith*, 139 U. S.,

128, and in *United States* v. *Union Stock Yards,* 226 U. S., 286. It was there stated:

The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars and ends only after the stock has been unloaded and delivered, or offered to be delivered, to the consignee, if to be found at such place as admits of their being safely taken into possession.

In *Doyle* v. *Continental,* 94 U. S., 535, the same court stated:

The opinion of a court must always be read in connection with the facts upon which it is based.

In the Covington Case there was no issue as to the carrier's duty to load and unload cars of live stock. The carriers long before had assumed the duty of loading and unloading live stock at the Covington stock yards. The carriers there involved held themselves out to perform the loading and unloading service and the record does not show whether this was brought about by competitive conditions or whether the service was compensated for in the line-haul rate. The court further stated in the same opinion:

A railroad company, it is true, is not a carrier of live stock with all the responsibilities that attend it as a carrier of goods. *North Penn* v. *Commercial Bank,* 123 U. S., 727, 734. There are recognized limitations upon the duty and responsibility of carriers of inanimate property that do not apply to carriers of live stock. These limitations arose from the nature of the particular property transported. But, notwithstanding this difference in duties and responsibilities, a railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported are concerned, as in the case of goods.

In other words, the railroad company becomes subject to the same obligations in respect to the delivery of live stock as in the case of goods. If it holds itself out to deliver for one person, it must deliver for all persons. It was testified in this case that in the calendar year 1917, 87.6 per cent of the stock originating on the Santa Fe system originated at points where the shippers did the loading. The Chicago & North Western Railway handled 68,000 cars of live stock to Chicago in 1917 and over 90 per cent originated at points where the shippers did the loading. The practice on these roads is said to be representative of the practices on other western roads.

Primary Markets.

The principal live stock markets are Chicago, Peoria, and East St. Louis, Ill., Omaha and Nebraska City, Nebr.; Sioux City, Iowa; Kansas City, St. Joseph, and St. Louis, Mo.; Atchison and Wichita, Kans.; Oklahoma City, Okla.; Amarillo, Fort Worth, and El Paso, Tex.; Pueblo and Denver, Colo.; St. Paul, Minn.; Milwaukee, Wis.; Detroit, Mich.; Louisville, Ky.; Cincinnati, Ohio; Indianapolis, Ind.; Pittsburgh and Philadelphia, Pa.; Jersey City, N. J.; and East Buffalo and New York, N. Y. At these points it is the practice for the carriers to absorb, at least in part, loading and unloading charges. The receipts of live stock at the Chicago stockyards for the year 1917 were 255,093 cars. The receipts during the month of January of that year were 29,329 cars. The amount of stock received daily is so large and the necessity for its prompt unloading is so imperative that it is probably impracticable for the actual consignees themselves to do the unloading. A force of men is maintained at the stockyards for that purpose, and it is testified that ordinarily a trainload of live stock will be unloaded at the rate of approximately one minute per car. There is inevitably considerable difference between the situation existing at country points, where the loading and unloading is performed by the shippers, and the situation at a great market like that afforded by the Chicago stockyards, where the receipts will often be as much as a thousand cars per day. Ordinarily train crews are not composed of stockmen, and it can not well be argued that there is any more obligation upon a railroad company to furnish train crews particularly skilled in the handling of live stock than there is to furnish crews particularly skilled in the handling of lumber, grain, or any other commodity. While it is true that the train crews at country stations do sometimes assist with the loading and unloading, their principal duties
329 are in connection with the proper and convenient placing of cars. The volume of receipts or shipments at country points is often so small that the maintenance by the railroad of an organization at such places for the purpose of loading and unloading cars is out of the question. At the Chicago stockyards the receipts and shipments are so large as to make necessary the maintenance of an organization to perform this service. This organization serves both the shippers and the carriers. The consignee finds his stock promptly unloaded and cared for, whether he is on hand at the moment of

its arrival or not. The carriers secure the prompt release of their equipment and its return to the service.

Are the Chicago Stock Yards the Live-Stock Terminals of the Line Haul Carriers?

Some testimony was offered as to the facilities of some of the carriers for receipt and delivery of live stock at points on their own rails within the city of Chicago. This has nothing to do with the question here in issue. There is no charge in the complaint that these facilities are not adequate for the receipt and delivery of all live stock which the shippers may desire to load at or consign to such points. A very large proportion, said to be as high as 98 per cent of the stock shipped to Chicago, is consigned to persons at the stock yards. None of the line haul carriers reaches the Chicago stock yards with its own rails, but all utilize the tracks of the Chicago Junction Railway, for which they pay a trackage charge as published in the tariff of the latter company.

In *Interstate Commerce Commission* v. *C., B. & Q. R. R. Co.*, 186 U. S., 320, the Supreme Court, in speaking of the right to divide the total rate to the stock yards into two parts consisting of a line haul charge and a switching charge, said:

We see no reason to doubt, under the facts of this case, the correctness of the rule as to the right to divide the rate, admitted by the Commission and announced by the court below. * * * Whether the rule which we approve as applied to the facts in this case will be applicable to terminal services by a carrier on his own line, which he was obliged to perform as a necessary incident of his contract to carry, and the performance of which was demanded of him by the shipper, is a question which does not arise on this record and as to which we are, therefore, called upon to express no opinion.

By this, it appears that the court did not consider the terminal service at the stockyards as a necessary incident to the contract to carry assumed by the line haul carriers; that in delivering at the stockyards they undertook a further and additional service—a delivery to a terminal not on their lines—and were entitled to additional compensation for so doing. These stockyards, however, are in fact a terminal for the receipt and delivery of live stock; that is one of the purposes for which they were created and one of the uses to which they are now put. The situation appears to be exactly the same as it

would be were the stockyards outside the city limits of Chicago. The stockyards must be the terminal for the receipt and delivery of live stock of the railroad utilizing them.

The complainant disclaims any attempt to prove that the increased loading and unloading charges are unreasonable in and of themselves. The claim is that, whether these charges are more or less than they reasonably should be, it is a service performed for the line-haul carriers, and must be paid for by them. The complainant does assert that the absorption of the entire loading and unloading charges by the line-haul carriers at other live-stock markets and the failure to absorb the entire charges at Chicago is unduly preferential of other markets and unduly prejudicial to the Chicago market.

A statement was filed in the record showing the charges accruing on four cars of cattle shipped to the Chicago stockyards from Plattsmouth, Mo. These charges were as follows:

Freight, including war tax and unabsorbed unloading charges	$245.28
Fire insurance	.40
Yardage	26.00
Feed	10.50
Live Stock Protective League	.20
Commission	60.00
Total	343.38
Sale price of stock	10,432.92
Net proceeds	10,089.54

The unabsorbed unloading charges on these four cars amounted to $1. The unloading charges that were absorbed were also $1. The line-haul carriers have always held themselves out to absorb 25 cents per car for unloading and 50 cents per car for loading at these yards. These carriers have not held themselves out in terms to absorb the entire charge for loading and unloading at Chicago. The additional charge of 25 cents per car which the shippers have been called upon to pay since May 21, 1917, is altogether too insignificant in quantity to affect the movement of stock to or from that market as compared with other markets. It seems altogether unlikely that its nonabsorption or absorption by the carriers has had or will have the effect of turning away or bringing to that market a single carload of stock.

The carriers ask the Commission to find that the absorption

of any part of the loading and unloading charges at Chi-
330 cago or other markets is unduly preferential of those markets and unduly prejudicial to the various points at which such charges are not absorbed. The organization at the stockyards that handles this stock fulfills a very necessary and useful purpose, serving the interests of both carriers and shippers, and can very well exact a fair and reasonable price for the service performed. The situation at this point, as well as at other markets, must rest upon its own bottom. In so far as the convenience of the railroads is aided and their equipment conserved by an organization at this market that loads and unloads the livestock, we can see nothing unlawful in the absorption of such part of these charges as will fairly represent the measure of the service renderd to the railroads.

The determination at each point where such an organization exists of the amount of the loading or unloading charges that the line-haul carriers may properly absorb in consideration of the service rendered to them rests, in the first instance, with the carriers serving such point. The record is not sufficient to enable us to reach a judgment as to what portion of the loading and unloading charges at the Chicago Stock Yards should be absorbed by the line-haul carriers.

The theory upon which the complainant, the stockyard company and the interveners have proceeded, is that the line-haul carriers created the situation existing at Chicago by the organization of the Union Stock Yards & Transit Company, and the absorption through many years of its loading and unloading charges; that the stockyard company is an agent of the line-haul carriers; that the facilities of that company are absolutely essential to a complete delivery at this great market; that these facilities are private property, not subject to public control, although used in performing a common carrier service; that whatever price the company may see fit to exact for the service rendered and the facilities used it must be paid by the line-haul carriers. They disregard the facts that the stockyard company is made a common carrier by the terms of its charter; that it has been held to be such by the Supreme Court of the United States; that its facilities for loading and unloading live stock are not on the rails of the line-haul carriers; and that these facilities are reached by the rails of the Chicago Junction Railway.

McChord, Commissioner:

Except as to certain unimportant changes the foregoing is the report prepared by the examiner and served upon the parties. Exceptions were filed thereto by certain of the parties.

Those filed by the Chicago, Milwaukee & St. Paul Railway Company and the Atchison, Topeka & Santa Fe Railway Company have been considered, and we find them not well taken. The exceptions filed by the stockyard company, the complainant, and the National Live Stock Shippers' Protective League will now be considered.

Certain questions of fact are raised in the exceptions, but upon examination of the record we find that the facts as stated are correct.

An exception is taken to the conclusion reached by the examiner that as to shipments of live stock the stockyard company is a common carrier and should file tariffs. It is contended that this question is not in issue. With this we can not agree. In order to dispose of the matters involved in this proceeding it is first necessary to determine the status of the stockyard company. If held to be a common carrier the provisions of the act so far as they are applicable must be complied with.

From the facts of record it is clear that the stockyard company is a common carrier within the meaning of section 1 of the act. It is performing services in connection with the receipt and delivery of interstate shipments. As above stated, the stockyard company was held to be a common carrier by the Supreme Court, and there has been practically no change in its status since that decision was rendered.

It is contended that the loading and unloading services are performed by the stockyard company as the carriers' agent, and that its charges therefor need not be filed under section 6 of the act whether or not it is a common carrier in respect to such service.

Section 6 of the act provides that common carriers shall file with the Commission schedules showing all charges for transportation, and that such schedules shall state separately all terminal charges and other charges which the Commission may require. Section 6 also provides that no carrier, unless otherwise provided, shall engage or participate in the transportation of property unless the charges upon which the same is transported have been filed and published in accordance with the provisions of the act.

Rule 10(c) of Tariff Circular 18-A provides that a terminal road must publish tariffs containing all its charges whether any part or all of such charges are absorbed by connecting carriers; and rule 10(e) provides that if part or all of the charges of a terminal carrier are to be absorbed by a con-

necting road, the tariff of such connecting road must specify that its rate includes originating or delivery services by the terminal road, and that it will absorb the charges of such terminal road in a specified sum, or as per the current tariffs on file with the Commission.

An exception is also taken to the examiner's conclusion that the stockyards are the terminals of the Chicago Junction Railway Company. In *Boardman & Co.* v. *S. P. Co.*, 37 I. C. C., 81, the Commission stated that in the absence of tariff provisions to the contrary the line-haul rate of a particular carrier includes the receipt or delivery of carload freight only at industries or other points located upon its own rails. In this case there are no tariff provisions requiring the line-haul carriers to make deliveries off their rails.

It is contended that when a carrier acquires, either by lease or under trackage arrangements, the right to use the rails of another carrier in its through business, the rails of the lessor, as between the shipper and the lessee, become the rails of the lessee and part of its system. The Chicago Junction Railway is a party to the tariffs of the line-haul carriers containing the rates to and from the stockyards, or the additional charges for the movement from the rails of the line-haul carriers to the stockyards are published in a tariff to which the Chicago Junction Railway is a participating carrier, so that the rates applied are either joint or combination rates to which the Chicago Junction Railway is a party.

An exception is also made to the conclusion that the loading and unloading of live stock is a duty of the shipper. It is contended that the service is for the carriers' benefit and not that of the shippers. It is clear that the line-haul carriers are under no obligation to load or unload live stock for shippers, and if they do so they are entitled to compensation therefor. In the absence of tariff provisions to the contrary this is a separate and distinct service not included in the transportation rate. We have held that for loading and unloading, and for all other special services apart from conveyance, the carriers may properly make a reasonable charge since they are not accessorial parts of the transportation which section 1 requires the carriers to furnish. *Dunnage Allowances,* 30 I. C. C., 538, 543.

Upon the facts of record we find that—

1. The Union Stock Yard & Transit Company of Chicago is a common carrier engaged in interstate commerce and subject to the provisions of the act to regulate commerce.

2. The notice of cancellation of its tariff of charges for loading and unloading live stock, in carloads, at the Chicago stockyards has not been justified.

3. The loading and unloading of live stock, in carloads, at the Chicago stockyards is a duty of the shipper.

4. The loading and unloading of live stock, in carloads, at the Chicago stockyards may be assumed by the carriers in those instances in which their convenience is aided and their equipment conserved by so doing.

5. The loading and unloading service performed by the Union Stock Yard & Transit Company is for the benefit of the shipper but tends also to the convenience of the line-haul carriers.

6. In the absence of a showing of undue prejudice, how much, if any, of the loading and unloading charges at the Chicago stockyards may properly be absorbed by the line-haul carriers is dependent upon the degree to which their interests are served in any particular instance.

7. The failure to absorb all of the charges for loading and unloading live stock at the Chicago stockyards, while absorbing all such charges at certain other markets, has not been shown on this record to produce undue prejudice against shippers of live stock at the Chicago stockyards.

8. The Chicago stockyards are the terminals for the receipt and delivery of live stock of the railroad utilizing them.

On December 28, 1917, the federal government assumed control generally of the transportation systems of the country, including those of the defendants in No. 9977. The stockyard company has not been taken over by the federal government. The Director General of Railroads has not been made a party defendant. No change due to the operation of the defendants' lines as a unit has been brought to our attention.

Our order suspended the cancellation notice until June 30, 1918, and the effective date thereof was voluntarily postponed by the stockyard company until January 1, 1919. No further postponement was made, so that there are no charges now on file covering the loading and unloading services. Section 6 of the act provides that no carrier, unless otherwise provided, shall engage or participate in the transportation of property unless the rates and charges upon which the same is transported have been filed and published in acordance with the provisions of the act. Therefore, if the circumstances and conditions surrounding the transportation since that date are similar to those in effect at the time the evidence was sub-

mitted, it would seem that the above requirement of the act has not been met. If such is the fact, prompt action should be taken by the stockyard company to remedy this situation.

An order will be entered dismissing the complaint, and the proceeding of investigation will be discontinued.

332 ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of February, A. D. 1919.

Investigation and Suspension Docket No. 1118.

Live Stock Loading and Unloading Charges.

No. 9977.

Chicago Live Stock Exchange

vs.

The Atchison, Topeka & Santa Fe Railway Company *et al.*

These cases being at issue, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It Is Ordered, That the complaint in No. 9977 be, and it is hereby, dismissed, and that the proceeding of investigation in Investigation and Suspension Docket No. 1118 be, and it is hereby, discontinued.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(Seal)

333 Mr. Godman: I will now offer in evidence as Plaintiffs' Exhibit 2 copy of the report and decision of the Interstate Commerce Commission in No. 9977, Chicago Live Stock Exchange *vs.* Atchison, Topeka and Santa Fe Railway, the Director General as Agent, et al., submitted January 10, 1920, and reported in Volume 58 of the Interstate Commerce Commission Reports, at page 164.

The Court: And it is filed with the pleadings as Exhibit B, so I am advised.

Mr. Hillyer: Yes, you have a copy of it there.

Mr. Godman: This Plaintiffs' 2, if the Court please, will include the opinion of the Commission and the order entered in connection therewith. Is Plaintiffs' Exhibit 2 received?

The Court: Yes.

Whereupon said document marked Plaintiffs' Exhibit 2 was received in evidence, and is in the words and figures following, to-wit:

334 PLAINTIFFS' EXHIBIT 2. Plaintiffs' Exhibit 2.

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INTERSTATE COMMERCE COMMISSION.

Investigation and Suspension Docket No. 1118.

Live Stock Loading and Unloading Charges.

No. 9977.

Chicago Live Stock Exchange

v.

Atchison, Topeka & Santa Fe Railway Company, Director General, As Agent, *Et Al.*

Submitted January 10, 1920. Decided July 15, 1920.

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1. Former finding, 52 I. C. C., 209, that loading and unloading of live stock, in carloads, at the Chicago stockyards is a duty of the shipper, reversed.

2. Collection of separate charges from shipper for unloading and loading live stock in addition to the rates on live stock to and from Chicago stockyards found to have been an unlawful and unreasonable practice. Reparation awarded.

3. The stockyards at Chicago found to be terminals of the line-haul carriers, the Chicago Junction Railway, and the stockyard company.

C. R. Hillyer and Sims, Welch & Godman for complainant.

S. H. Cowan, Clifford Thorne, and Graddy Cary for National Live Stock Shippers Protective League and American National Live Stock Association; R. D. Rynder for Swift & Company; Clifford Thorne, Ralph Merriam, and A. Sykes for Corn Belt Meat Producers Association; A. F. Stryker for Omaha Live Stock Exchange; Edward F. Keefer for Illinois Live Stock Association and National Live Stock Shippers League; W. H. Timmel for Sioux City Live Stock Exchange; A. E. Helm for Public Utilities Commission of the State of Kansas; Walter Condran for Board of Railroad Commissioners of Iowa; F. B. Edmonds for Cincinnati Live Stock Exchange; Samuel Jefferis for Pittsburgh Live Stock Exchange; and John G. Meister for Peoria Live Stock Exchange.

Winston, Strawn & Shaw and John C. Slade for Union Stock Yard & Transit Company and Chicago Junction Railway Company.

R. H. Widdicombe, Kenneth F. Burgess, W. F. Dickinson, J. N. Davis, James Stillwell, and T. J. Norton for line-haul defendants.

335 Report of the Commission on Further Hearing.

McChord, Commissioner:

On petitioners of interested parties these cases reported in 52 I. C. C., 209, were reopened for further hearing with respect to the following questions:

1. The amount of the loading and unloading charges for live stock at the Chicago stockyards.

2. The amount of such charges, if any, that should be imposed upon shippers of live stock, or should be absorbed by the defendants.

3. Whether the stockyards are the terminals of the Chicago Junction Railway Company, and,

4. Whether the tariff arrangements between the Union Stock Yard & Transit Company and the other defendants with respect to delivery and handling of live stock at the stockyards are in compliance with the act.

Further hearing was had and a proposed report prepared by the examiner was served on the parties. Exceptions were filed and the cases were orally argued before us.

This proceeding grows out of the increases on May 21, 1917, in the charges of the Union Stock Yard & Transit Company, hereinafter called the stockyard company, for unloading and loading live stock at Chicago from 25 and 50 cents per car to 50 and 75 cents, respectively. The carriers transporting live stock to and from Chicago had borne or absorbed the former charges, but refused to bear or absorb the increase in the charges, with the result that the stockyard company collected and retained such additional charges from the shipper. Subsequently the stockyard company attempted to cancel its tariff naming the unloading and loading charges and make them the subject of an operating arrangement between itself and the carriers, but upon protest the proposed cancellation was suspended.

In our original report we found, among other things, that the loading and unloading of live stock at the stockyards in Chicago is the duty of the shipper, and that the stockyards are the terminals for the receipt and delivery of live stock of the railroad utilizing them. The controversy chiefly relates to these two findings. There are other findings that are the subject of exceptions and protests, which will be considered later. It is the contention of the line-haul defendants that the question of the duty of the shipper to perform loading and unloading service is not involved in the questions with respect to which the cases were reopened. This contention is not tenable because the question of whether the shipper or carriers are obligated to render the service is inextricably bound up with the question of whether the charges may lawfully be imposed on the shipper. In so far as the future is considered this question is concluded by the transportation act, 1920. That act, amending section 15 of the interstate commerce act, with certain exceptions not here material, provides that—

> transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments without extra charge therefor to the shipper, consignee, or owner, * * *.

Since the passage of this act the line-haul carriers have provided for the absorption of the charges of 50 cents and 75

cents for unloading and loading live stock, respectively, published by the stockyard company.

The facts in this case are not in dispute. For more than 50 years carriers delivering live stock at the stockyards in Chicago have loaded and unloaded live stock, and made no charge therefor against the shipper. More than 4,000 cars of live stock are frequently delivered at the stockyards in Chicago on a single day. It is manifest that if the consignees or shippers undertook to unload their inbound shipments, or to load outbound shipments, there would result such confusion and congestion at the stockyards as seriously to interfere with orderly and prompt performance of the service. Counsel for the line-haul carriers conceded at the hearing that the shipper can not go to the stockyards and physically load or unload his live stock; but their contention is that he should do it financially. Under the regulations of the stockyard company no shipper is permitted to perform the service, even if he should demand the right to do so. The line-haul rates to Chicago, plus a charge of $2 for terminal or switching service, have for years constituted the through charge and included delivery of live stock to the consignee at the stockyards. For the reasons stated we are of opinion that our finding that it is the duty of the shipper to load and unload live stock in the stockyards at Chicago was error, and it is therefore reversed. And we now find that it was the duty of the carriers to unload and load live stock at that point.

In *United States* v. *Union Stock Yard,* 226 U. S., 286, the Supreme Court held that the stockyard company was a common carrier. At the time of that decision there existed a lease between the stockyard company and the Chicago Junction Railway, hereinafter called the Junction company, which had about 35 years to run, by the terms of which the stockyard company granted all its railroad property to the Junction company and for which the latter paid two-thirds of its profit as rental. Shortly after that decision this lease was canceled and the parties entered into a new lease under
336 the terms of which the Junction company was granted, in perpetuity, all the property covered by the former lease, for which it agreed to pay a rental of $600,000 per year. The character of the service has remained the same. The change in the lease has made no practical change in the status of the stockyard company since the decision of the Supreme Court. We adhere to our finding that the stockyard company is a common carrier engaged in interstate commerce. As

the services of unloading and loading are part of the transportation of live stock the collection of separate charges from the shippers for unloading or loading in addition to the rates on live stock from and to interstate points to and from the stockyards was an unlawful and unreasonable practice.

Considering the fact that, except under certain conditions not material here, the services of unloading and loading at the stockyards are included in the transportation of live stock and no extra charge can be made for these services, it becomes unnecessary to pass upon the reasonableness of the separately established charges of the stockyard company for unloading and loading live stock.

The apprehensions of the line-haul carriers that the stockyard company may make any charge it pleases, which they will be required to pay, are not well founded. Upon their complaint or upon the complaint of any party, we can examine any of the charges that make up the sum of the through charges, and may prescribe just and reasonable rates for all carriers concerned, either by prescribing through routes and joint rates and the divisions thereof, or otherwise, as the facts may warrant.

The examiner proposed that we find that the stockyards are the terminals of the Junction company. The inducement for that suggestion was doubtless that the Junction company and the stockyard company together constitute a railroad company, subject to the act, as found by the Supreme Court. The line-haul carriers vigorously contend that the stockyards may not with propriety be held to be their terminals. They point to the fact that their rates carry the live stock to connecting lines in the Chicago switching district, and that the $2 switching charge is for the movement from their connection with the Junction company's rails to the platforms of the stockyard company. They also assert that they do not own, and do not have any control over, the platforms, chutes, or pens of the stockyard company.

Standing alone the stockyards could not be readily availed of by shippers. Were it not for the tracks of the Junction company delivery of cattle in carloads would not be possible. It requires the line-haul carriers, the Junction company, and the stockyard company to make the stockyards an effective agency of interstate commerce. Under this state of facts we are of opinion and find that the stockyards are in effect terminals of the line-haul carriers, the Junction company, and the stockyard company.

We further find that shippers who paid and bore charges for unloading and loading live stock at the stockyards in addition to the rates to and from the stockyards and who are parties of record herein have been damaged in the amount of such charges and are entitled to reparation, with interest from the date of such payment. The exact amount of reparation due each shipper can not be determined on this record, and they should comply with rule V of the Rules of Practice.

By the Commission.

GEORGE B. McGINTY,
(Seal) *Secretary.*

337 Whereupon the jury retired and the following proceedings were had out of the presence of the jury:

Mr. Godman: If the Court please, the Receivers of the Chicago and Alton Railroad are made parties defendant in this matter, and on motion of the plaintiff I will ask that they be dismissed.

Mr. Towner: The order will be that they are dismissed, as to the Receivers of the Alton.

The Court: Yes.

Mr. Godman: Dismissed on motion of the plaintiff.

And afterwards, to-wit, on January 8, 1930, the following proceedings were had in the presence of the jury:

Mr. Godman: If the Court please, I offer in evidence as Plaintiffs' Exhibit 3 the opinion and decision of the Interstate Commerce Commission in No. 9917, *Chicago Live Stock Exchange* vs. *Atchison, Topeka and Santa Fe Railway, et al.*, which is reported in the 100 Interstate Commerce Commission report, submitted November 13, 1924, and decided June 2, 1925.

The Court: Any objection?

Mr. Towner: No, Your Honor.

The Court: It may be admitted.

Whereupon said document, marked Plaintiffs' Exhibit 3, was received in evidence, and is in the words and figures following, to-wit:

338 PLAINTIFFS' EXHIBIT 3. Plaintiffs' Exhibit 3.

ADP

10461

INTERSTATE COMMERCE COMMISSION

No. 9977

Chicago Live Stock Exchange v. *Atchison, Topeka & Santa Fe Railway Company et al.*

No. 9977[1]

Chicago Live Stock Exchange v. *Atchison, Topeka & Santa Fe Railway Company et al.*

Submitted November 13, 1924. Decided June 2, 1925.

Upon further hearing, reparation found due on account of the unlawful collection of separate charges for the loading and unloading of livestock, in carloads, at the Chicago stockyards. Former report, 58 I. C. C. 164.

C. R. Hillyer, Sims, Welch, Godman & de Young, Everett C. Brown, D. C. Mosier, and H. R. Park for complainants.

F. E. Andrews for western trunk-line carriers; James Stillwell, J. L. Aber, and D. P. Connell for Central Freight Association lines; John F. Finerty and Thomas M. Woodward for Director General of Railroads, as agent; and Ralph M. Shaw, Frank H. Towner, and Guy A. Gladson for Union Stock Yard & Transit Company, defendants.

Nuel D. Belnap, Luther M. Walter, and John S. Burchmore for Morris & Company and Wilson & Company, Incorporated; Paul E. Blanchard for Armour & Company; and R. D. Rynder and P. L. Holden for Swift & Company and various other interveners.

Report of the Commission on Further Hearing.

McChord, Commissioner:

Defendants have filed exceptions to the report proposed by

[1]This report also embraces No. 12614, Chicago Live Stock Exchange et al. v. Director General, as Agent, Atchison, Topeka & Santa Fe Railway Company, et al.

the examiner, and the parties have been heard in oral argument. We reach the conclusions proposed.

In our report of July 15, 1920, on further hearing, in No. 9977, 58 I. C. C. 164, we found that the "shippers who paid and bore the charges * * * and who are parties of record herein" are entitled to reparation, following a finding that the collection, between May 21, 1917, and April 1, 1920, of separate charges from shippers for loading and unloading ordinary livestock at, in addition to the rates to and from, Chicago stockyards was an unlawful and unreasonable practice. As the record then before us did not indicate the amount of reparation due each shipper, the parties were requested to
339 comply with Rule V of the Rules of Practice. On behalf of complainants this was done in the early part of 1921, upon a form which embraced the essential information required in reparation statements. Separate statements were prepared for each of the line-haul defendants which handled the traffic into and out of Chicago, the shipments having been listed thereon in chronological order. Copies of these statements were filed with us as well as with each of the interested carriers, and in a number of instances their accuracy was attested by accounting officers of the carriers. Several of the interveners, for the most part the larger packers and companies affiliated with them, also submitted reparation statements prepared in the usual manner, and in some instances they have been certified by carriers' auditing departments as correct. In the meantime, however, there had been raised by counsel for the Director General of Railroads, as agent, and upon the Union Stock Yard & Transit Company, hereinafter called the stockyard company, questions as to who were the parties of record entitled to reparation, and which among the defendants should satisfy any order of reparation which might be entered.

The complaint in No. 9977, filed November 17, 1917, brought in issue interstate shipments and named as complainant only the Chicago Live Stock Exchange. While the latter was described in the body of the complaint as "an association of persons, firms, and corporations" whose membership consisted of "livestock commission merchants, owners and raisers of cattle engaged in the buying, selling, receiving, and shipping of livestock in interstate and foreign commerce," and it was recited "that the said association represents every shipper and receiver of livestock at every station in the United States shipping to and from the public livestock market located at the Union Stock Yards in the city of Chicago, Ill.," hereinafter re-

ferred to as the stockyards, none of the parties so described were specifically named in the complaint. On June 16, 1919, counsel for complainant transmitted to us, apparently without service on the defendants, "a printed list of farmers, stock raisers, and shippers throughout the country who have made shipments to and from the Chicago market during the past two years and who have paid the charges under investigation in this proceeding." However, the complainants and their shipments were identified by reason of the fact that none but members of the exchange were permitted to do business through the stockyards, participant in the transportation, where all such members were known and where their shipments were matters of record.

Because of the delay encountered in adjusting the matter of reparation, and with a view to meeting the various questions raised by counsel for defendants, the complaint in No. 12614 was filed February 25, 1921. The issues in this complaint are in substance the same as those in No. 9977. In addition, it names the director general, as agent, as a defendant, alleges violation of the Federal control act, covers shipments within the State of Illinois during the period of Federal control, and also includes interstate shipments from the date of filing the first complaint to the end of the reparation period. It specifically names in the body thereof the 103 members of the complainant association and recites that it is filed in their behalf, severally and collectively, and also as factors and agents on behalf of the owners, consignors, and consignees of the shipments to and from the stockyards. All of the latter parties are listed in an appendix to the complaint.

By virtue of paragraphs (c) and (f) of section 206 of the transportation act, 1920, the complaint in No. 12614 embraces all shipments, other than those intrastate outside of the period of Federal control, which moved, during the period of two years, plus the Federal control period, which preceded the filing of the complaint. *Cohn* v. *C., M. & St. P. Ry. Co.*, 96 I. C. C. 257. The complaint is filed for and in behalf of the members of the complainant exchange and others therein listed and is equally their complaint. *Michigan Hardwood Mfrs. Asso.* v. *Freight Bureau*, 27 I. C. C. 32.

The amount of reparation here sought will probably total somewhere between $225,000 and $250,000. The shipments embraced in the reparation claims fall into two general classes, namely, interstate shipments throughout the reparation period, including those made prior and subsequent to, as well as during, Federal control, and intrastate shipments during Fed-

eral control. The findings in our former report, 58 I. C. C. 164, covered interstate shipments which were made up to the time of taking the testimony supporting those findings, viz., May 22, 1919. With respect to interstate shipments made since that time it is established that they moved from and to the same general territories, were either unloaded or loaded at the stockyards, and the same charge was assessed; and that the facts, circumstances, and conditions surrounding these shipments, as well as the intrastate shipments during Federal control, are in all substantial respects the same as those related of record covering the interstate shipments in the original complaint. Supplementing the findings in our former report, 58 I. C. C. 164, we find that the collection of separate charges from complainants and interveners for the service of unloading and loading interstate shipments of ordinary livestock at the Chicago stockyards, in addition to the line-haul rates on such livestock, during the reparation period hereinbefore defined, and intrastate shipments during the period of Federal control, was an unlawful and unreasonable practice.

340 We further find that the following parties of record, either as interveners or complainants other than members of the exchange, have established by competent testimony that they both paid and bore the charges herein found unlawful and unreasonable, and that they have been damaged in the amount of such charges and are entitled to reparation with interest from the date of such payment:

Armour & Company.
Wilson & Company, Incorporated.
Morris & Company.
Jos. Stearn & Sons, Incorporated.
Swift & Company.
Plankington Packing House.
White, Peavey & Dexter.
Springfield Provision Company.
Sperry & Barnes Company.
John P. Squire & Company.
United Pressed Beef Company.
Sturtevant & Haley Beef & Supply Company.
North Packing & Provision Company.
Kerber Packing Company.
Nagle Packing Company.

The foregoing parties paid the charges in question, either as consignees at Chicago for the service of unloading at that

point, or as consignees at other points for the service of loading at Chicago, and in each case the charges were paid direct to the line-haul carriers at Chicago or the other points.

The following parties appeared for the first time and offered testimony as interveners in the hearings at Boston on February 24, 1923. Their claims are barred from consideration by the statute of limitations;

New England Dressed Meat & Wool Company.
Brighton Dressed Meat Company.
William H. Monroe.

Most of the reparation claimed is by the livestock commission merchants, members of the exchange, covering amounts collected from them for the unloading service at the stockyards. They seek reimbursement in their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers and also as factors and agents for and on behalf of the livestock shippers who were the consignors. While it is admitted that in each and every instance the charge which was paid by the commission merchant was subsequently charged back and collected from the consignors, this would not affect the right of the complainant consignees to awards of reparation. There is a direct and well-established relation between the complaining members of the exchange and their shippers by which the former are fully authorized to present these claims and seek awards of reparation in their own names as factors and agents for such shippers. The commission merchant at the stockyards not only disposes of the shipper's stock at the market and at such price as he deems best, but is his agent in the payment of freight and related charges, such as feeding, etc., and in the filing of claims for overcharge and for loss and damage to the stock in transit. Defendants have frequently recognized this relationship by settling loss and damage claims with the commission merchants. The right of factors in their representative capacity to recover reparation in their own names for unlawful and unreasonable charges is settled. *Memphis Freight Bureau* v. *St. L. & S. F. R. R. Co.*, 57 I. C. C. 212.

We find that the following individuals, copartnerships, and corporations, parties of record, made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to reparation, as

factors and agents for the shippers, with interest from date of payment:

National Livestock Commission Company (corporation).

Bowles Livestock Commission Company (corporation).

John P. Martin, James G. Martin, George E. Martin, and Wm. S. Burmister, copartners trading as Martin Bros. & Company.

Kay Wood and Chas. A. Wood, copartners trading as Wood Bros.

Iowa Livestock Commission Company (corporation).

John A. Babcock, individual trading under the name of John A. Babcock & Company.

James R. Clegg, individual trading under the name of James R. Clegg & Company.

W. Harry Sherwood and Russell H. Sherwood, copartners trading as Sherwood & Son.

S. G. Gillogly, R. E. Gillogly, F. D. Gillogly, and F. T. Gillogly, copartners trading as Gillogly & Company.

Thos. K. Polley, individual trading as Thos. K. Polley & Company.

L. S. Larrison, individual trading as L. S. Larrison & Company.

J. F. Cross and H. G. Sommers, copartners trading as Cross, Sommers & Company.

T. B. Stafford and A. B. Stafford, copartners trading as Stafford Bros.

W. E. Young, individual trading as W. E. Young & Company.

J. J. Sullivan and J. C. Sullivan, copartners trading as Sullivan Commission Company.

G. B. Van Norman, individual trading as G. B. Van Norman & Company.

W. A. Peterson and Wm. Turnbull, copartners trading as Peterson, Turnbull & Company.

W. A. Peterson, surviving partner of the copartnership composed of Frank Bacon and W. A. Peterson, trading as Bacon, Peterson & Company.

Evans, Snider, Buel Company (corporation).

A. F. Stewart, individual trading as A. F. Stewart & Company.

F. C. Ludeman, individual trading as F. C. Ludeman & Company.

Jet Wimp, individual trading as Jet Wimp & Company.

R. H. Pritchard, individual trading as Pritchard Commission Company.

Guy Wheeler and T. K. Polley, copartners trading as Emmett, Wheeler & Polley.

341 W. W. Wilson and Chas. A. Wilson, copartners trading as W. W. Wilson & Company.

A. A. Walters, C. A. Dunbar and J. H. Dunbar, copartners trading as Walters & Dunbar.

Geo. F. Hogan, individual trading as Geo. F. Hogan & Company.

Central Livestock Commission Company (corporation).

Fred L. Heyne and D. H. Baker, copartners trading as Baker, Heyne & Company.

John Clay, John G. Forrest, C. A. Kleman, F. H. Connor, and C. L. Robinson, copartners trading as Clay, Robinson & Company.

I. W. Knettle and Edwin Knettle, copartners trading as Knettle Bros.

Standard Livestock Commission Company (corporation).

W. R. Smith, J. C. Eastes, and John Smith, copartners trading as W. R. Smith & Company.

McCausland, Hoag & Vaughn (corporation).

S. S. Driver, individual trading as S. S. Driver & Company.

Northwestern Livestock Commission Company (corporation).

Lee Livestock Commission Company (corporation).

Van Norman, Lawler & Company (corporation).

A. B. Daniels (individual).

Alexander, Conover & Martin (corporation).

J. B. Cahill, individual trading as J. B. Cahill & Company.

A. M. Henneberry and N. W. Cochran, copartners trading as Cochran & Henneberry.

Chas. R. Rice and Oscar A. Rice, copartners trading as Rice Bros.

P. J. Fitzgerald and G. S. Freeman, copartners trading as Freeman, Fitzgerald & Company.

L. B. Werden (individual).

Ernest Clark and Louis Armbrecht, copartners trading as Clark, Armbrecht & Company.

Wm. B. Swinney, Chas. M. Swinney, and Thos. E. Swinney, copartners trading as Swinney Bros., successors in interest to Bunker & Swinney.

W. H. Walter, individual trading under the name of Walter Bros.

D. L. Trout and F. L. Trout, copartners trading as Trout Livestock Commission Company.

Geo. J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen.

J. M. Corrick (individual).

Rosenbaum & Company (corporation).

A. Warheimer, E. H. Ingwerson, J. H. Ingwerson, Dan R. Ingwerson, D. C. Mosier, and A. C. Barroff, copartners trading as Ingwerson Bros.

Fred Freeman, individual trading as Fred Freeman & Company.

Thos. H. Brown (individual).

C. A. Ingwerson (individual).

J. M. Doud & Company (corporation).

J. E. Strader and J. L. Strader, copartners trading as Strader Bros.

Conklin Bros. Commission Company (corporation).

J. Paul Shinn, Chas. H. Moberly, and I. O. Fry, copartners trading as Shinn, Fry & Moberly, successors to Shinn, Fry & Company.

J. P. Maley and Harry L. Carpenter, copartners trading as Maley, Carpenter & Company.

Frank R. Mullen, individual, trading as Mullen Commission Company.

George M. Brownson and J. L. Ettlinger, copartners trading as Brownson & Ettlinger.

Miller, White & Woods (corporation).

Filler, Wilson & McClelland (corporation).

Thos. Tipton, E. M. Steck, and W. P. Herrick, copartners trading as Tipton, Steck & Herrick.

John G. Adler and Alfred E. Adler, copartners trading as Adler Sons & Company.

G. W. Nixon, C. S. Horn, and W. H. Chisholm, copartners trading as Nixon, Horn & Chisholm.

L. B. Yancey (individual).

W. P. Collings, individual, trading as W. P. Collings & Son.

E. H. Kuenster, surviving partner of the copartnership of Erwin & Kuenster.

E. H. Kuenster, individual, trading as Kuenster Livestock Commission Company.

Wm. Gentleman, A. M. Gentleman, C. F. Gentleman, and J. G. Gentleman, copartners trading as Wm. Gentleman & Sons.

Robert S. Murray, individual trading as Murray & McDowell.

Chas. E. Harding, individual, trading as Chas. E. Harding & Company.

Hefner Commission Company (corporation).

A. Gilmore, C. L. Swanson, and C. J. Castenhold, copartners trading as Swanson, Gilmore & Castenhold.

Wm. Mahoney (individual).

A. J. Laberthe (individual).

Byers Brothers Company (corporation).

H. D. Copeland & Company (corporation).

Chas. E. Stephens and J. A. Goble, copartners trading as Stephens & Goble.

B. F. Hubbird, individual, trading under the name of Minteer, Hubbird & Company.

J. B. Roach and W. P. Roach, copartners trading as the Roach Livestock Commission Company.

E. C. Brown and Seth B. St. John, copartners trading as Brown-St. John Company.

Harry Thompson and C. N. Ball, copartners trading as Thomson & Ball.

J. W. Eastland, individual trading as J. W. Eastland & Company.

Chas. R. Beason and P. E. Moore, copartners trading under the name of Drovers Commission Company.

E. A. Clark, surviving partner of the copartnership composed of B. B. Bowles and E. A. Clark, trading under the name of Clark, Bowles & Company.

P. T. Dolan, surviving partner of the copartnership composed of Chas. P. Miller and P. T. Dolan, trading under the name of Miller & Dolan.

P. T. Dolan and Fred Ludeman, copartners trading as Dolan & Ludeman.

A. F. Starett, jr., O. A. Mathison, A. C. Granger, and M. E. Peschong, copartners trading as Starett, Mathison & Company.

Curtis A. Wood and Walter R. Wood, copartners, trading as Curtis A. Wood & Company.

Silas Palmer and W. H. Palmer, copartners trading as Silas Palmer & Son.

W. C. Patterson, surviving partner of the copartnership composed of Philip Fortin and W. C. Patterson, trading as John Patterson & Son.

O. D. Freeland and C. M. Godfrey, copartners trading as Freeland & Godfrey.

James G. Shutter (individual).

T. B. Vincent and C. H. Bothroyd, copartners trading as the Paris Commission Company.

F. W. Sheldon, individual trading as F. W. Sheldon & Company.

342 J. H. Piatt, individual trading as Abner Piatt & Company.

Knollin Sheep Commission Company (corporation).

North American Livestock Commission Company (corporation.

It developed that some of the reparation statements embraced intrastate shipments which moved both prior and subsequent to Federal control. As to such shipments we are without authority to award reparation and it was understood by counsel that before these statements were finally submitted to the carriers for checking, prior to the entry of any reparation order which might be issued, they would be eliminated.

It also developed that for short periods of time following the establishment of the increased loading and unloading charge on May 21, 1917, a number of the line-haul carriers, all of whom were then represented by separate agents rather than by the joint agency which was established during the period of Federal control, failed or omitted to add the extra 25 cents to their freight bills or waybills, with the result that in such instances this amount was not, and apparently has not been, collected. So far as applicable to shipments coming under our jurisdiction, collection of these undercharges may be waived.

The foregoing complainants and interveners found entitled to reparation should severally prepare statements in accordance with Rule V of the Rules of Practice, separated as to participating defendant carriers, including as a defendant the stockyard company and also including the Director General of Railroads, as agent, in appropriate cases in No. 12614. The statements should be submitted to the appropriate defendants for verification. If not so verified within a reasonable time, they should be filed here for check upon the record, with a view to the entry of an order awarding reparation.

Hall, Commissioner, concurring:

I join in the award of reparation to those complainants only as constrained thereto by the decision of the majority in *Missouri Portland Cement Co.* v. *Director General*, 88 I. C. C. 492, and am authorized by Commissioners Esch, Lewis, and Cox, to say that their participation in the award is under the same constraint.

343 Mr. Towner: May it be understood that the plaintiffs whose names you are now reading are named as plaintiffs in this case.

Mr. Godman: They are complainants in 12614 and plaintiffs in this pending case we are now trying.

Mr. Godman: Now I offer the copy of the order of the Interstate Commerce Commission made December 12, 1927, in No. 9977, *Chicago Live Stock Exchange* v. *the Atchison, Topeka and Santa Fe Railway, et al.*, No. 12614; the same is against the first Director General, as Agent, of the Atchison, Topeka and Santa Fe Railway, this being a reparation order.

The Court: Do you make an objection to it?

Mr. Towner: No.

The Court: Very well, let it be admitted.

Whereupon said document, marked Plaintiffs' Exhibit 4 was received in evidence, and is in the words and figures following, to-wit:

344 PLAINTIFF'S EXHIBIT 4.

A. D. P.

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of December, A. D. 1927.

No. 9977

The Chicago Live Stock Exchange

v.

The Atchison, Topeka & Santa Fe Railway Company *et al.*

No. 12614

Same

v.

Director General, as Agent, The Atchison, Topeka & Santa Fe Railway Company, *et al.*

It appearing, That on February 11, 1919, the commission entered its report, and on July 15, 1920, and June 2, 1925, its reports on further hearings in the above-entitled proceed-

ings, which reports are hereby referred to and made a part hereof, and these proceedings now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing, among other things, the dates on which payment of the charges assailed was made; we find that complainants shown in the following table are entitled to awards of reparation from the defendants named below in the amounts set opposite their respective names, with interest:

Complainants		Defendants	Amount
Geo. J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen		USY&TCo. and CGW	$ 1.25
	Do	USY&TCo. and C&A	.50
	Do	USY&TCo. and DG for C&A	2.75
	Do	USY&TCo. and DG for CGW	19.75
	Do	USY&TCo. and DG for Erie	.50
	Do	USY&TCo. and PM	.25
	Do	USY&TCo. and DG for PM	1.50
	Do	USY&TCo. and NYC	.50
	Do	USY&TCo. and DG for NYC	3.25
	Do	USY&TCo. and CI&L	.25
	Do	USY&TCo. and DG for CI&L	6.25
	Do	USY&TCo. and DG for PCC&StL and Penn	1.00
	Do	USY&TCo. and Penn	.50
	Do	USY&TCo. and Soo	.25
	Do	USY&TCo. and MC	.50
	Do	USY&TCo. and C&EI	1.75
	Do	USY&TCo. and DG for C&EI	65.25
	Do	USY&TCo. and DG for MC	.25
	Do	USY&TCo. and DG for Soo	.75
	Do	USY&TCo. and DG for AT&SF	25.00
	Do	USY&TCo. and DG for Wab	6.50
	Do	USY&TCo. and DG for GT	3.75
	Do	USY&TCo. and DG for Penn	2.00
	Do	USY&TCo. and DG for CRI&P	71.50
	Do	USY&TCo. and DG for CB&Q	299.75
345	Do	USY&TCo. and DG for CM&StP	$ 88.50
	Do	USY&TCo. and DG for IC	47.50
	Do	USY&TCo. and AT&SF	2.25
	Do	USY&TCo. and CB&Q	44.75
	Do	USY&TCo. and CRI&P	6.25
	Do	USY&TCo. and IC	1.25
	Do	USY&TCo. and CM&StP	4.25
	Do	USY&TCo. and DG for C&NW	121.00
	Do	USY&TCo. and C&NW	28.25
John G. Adler and Alfred E. Adler, copartners trading as Adler Sons & Company		USY&TCo. and CGW	5.75
	Do	USY&TCo. and DG for C&A	8.00
	Do	USY&TCo. and DG for CGW	5.75
	Do	USY&TCo. and DG for NYC	2.00
	Do	USY&TCo. and DG for CI&L	.50

	Complainants	Defendants	Amount
	Do	USY&TCo. and Soo	.50
	Do	USY&TCo. and C&EI	.75
	Do	USY&TCo. and DG for C&EI	14.25
	Do	USY&TCo. and DG for MC	.50
	Do	USY&TCo. and DG for Soo	1.25
	Do	USY&TCo. and DG for AT&SF	12.75
	Do	USY&TCo. and DG for Wab	1.25
	Do	USY&TCo. and DG for GT	.25
	Do	USY&TCo. and DG for NYC&StL	.50
	Do	USY&TCo. and DG for CRI&P	194.75
	Do	USY&TCo. and DG for CB&Q	171.75
	Do	USY&TCo. and DG for CM&StP	33.25
	Do	USY&TCo. and DG for IC	31.25
	Do	USY&TCo. and AT&SF	.75
	Do	USY&TCo. and CB&Q	3.00
	Do	USY&TCo. and CRI&P	3.50
	Do	USY&TCo. and IC	4.25
	Do	USY&TCo. and CM&StP	4.00
	Do	USY&TCo. and DG for C&NW	50.50
	Do	USY&TCo. and C&NW	16.50
	Alexander, Conover & Martin	USY&TCo. and DG for B&O	3.75
	Do	USY&TCo. and CGW	5.75
	Do	USY&TCo. and C&A	41.75
	Do	USY&TCo. and DG for C&A	265.00
	Do	USY&TCo. and DG for CGW	63.50
	Do	USY&TCo. and DG for Erie	7.50
	Do	USY&TCo. and PM	.25
	Do	USY&TCo. and DG for PM	9.75
	Do	USY&TCo. and Erie	1.00
	Do	USY&TCo. and Wab	10.25
	Do	USY&TCo. and NYC	6.75
	Do	USY&TCo. and DG for NYC	104.50
	Do	USY&TCo. and CI&L	5.75
	Do	USY&TCo. and DG for CI&L	85.75
	Do	USY&TCo., PCC&StL, and Penn	2.25
	Do	USY&TCo. and DG for PCC&StL and Penn	55.25
	Do	USY&TCo. and NYC&StL	.25
	Do	USY&TCo. and GT	5.00
	Do	USY&TCo. and Penn	4.25
346	Do	USY&TCo. and Soo	$ 14.50
	Do	USY&TCo. and MC	6.50
	Do	USY&TCo. and C&EI	20.00
	Do	USY&TCo. and DG for C&EI	203.75
	Do	USY&TCo. and DG for MC	6.50
	Do	USY&TCo. and DG for Soo	15.50
	Do	USY&TCo. and DG for AT&SF	351.00
	Do	USY&TCo. and DG for Wab	200.75
	Do	USY&TCo. and DG for GT	15.75
	Do	USY&TCo. and DG for NYC&StL	4.50
	Do	USY&TCo. and DG for Penn	15.50
	Do	USY&TCo. and DG for CRI&P	318.50
	Do	USY&TCo. and DG for CB&Q	822.25
	Do	USY&TCo. and DG for CM&StP	299.00
	Do	USY&TCo. and DG for IC	333.75
	Do	USY&TCo. and AT&SF	39.75
	Do	USY&TCo. and CB&Q	178.25
	Do	USY&TCo. and CRI&P	62.25
	Do	USY&TCo. and IC	22.75

	Complainants	Defendants	Amount
	Do	USY&TCo. and CM&StP	51.75
	Do	USY&TCo. and DG for C&NW	647.75
	Do	USY&TCo. and C&NW	122.25
	John A. Babcock, trading as John A. Babcock & Company	USY&TCo. and DG for B&O	.50
	Do	USY&TCo. and CGW	1.25
	Do	USY&TCo. and DG for CGW	5.75
	Do	USY&TCo. and DG for PCC&StL and Penn	.25
	Do	USY&TCo. and Soo	.50
	Do	USY&TCo. and DG for Soo	4.00
	Do	USY&TCo. and DG for Wab	.25
	Do	USY&TCo. and DG for CRI&P	400.75
	Do	USY&TCo. and CB&Q	77.50
	Do	USY&TCo. and DG for CM&StP	99.00
	Do	USY&TCo. and DG for IC	6.50
	Do	USY&TCo. and CB&Q	24.00
	Do	USY&TCo. and CRI&P	54.25
	Do	USY&TCo. and IC	.50
	Do	USY&TCo. and CM&AtP	23.15
	Do	USY&TCo. and DG for C&NW	75.50
	Do	USY&TCo. and C&NW	26.25
	Fred L. Heyne and D. H. Baker, copartners trading as Baker Heyne & Company	USY&TCo. and CGW	3.75
	Do	USY&TCo. and C&A	.50
	Do	USY&TCo. and DG for C&A	41.50
	Do	USY&TCo. and DG for CGW	42.00
	Do	USY&TCo. and DG for PM	.75
	Do	USY&TCo. and DG for NYC	1.25
	Do	USY&TCo. and CI&L	.25
	Do	USY&TCo. and DG for PCC&StL and Penn	.50
	Do	USY&TCo. and GT	.50
	Do	USY&TCo. and Soo	.50
	Do	USY&TCo. and MC	.75
	Do	USY&TCo. and C&EI	.25
	Do	USY&TCo. and DG for C&EI	2.25
	Do	USY&TCo. and DG for Soo	8.25
347	Do	USY&TCo. and DG for AT&SF	$ 8.75
	Do	USY&TCo. and DG for Wab	37.75
	Do	USY&TCo. and DG for GT	2.25
	Do	USY&TCo. and DG for Penn	.25
	Do	USY&TCo. and DG for CRI&P	89.00
	Do	USY&TCo. and DG for CB&Q	108.50
	Do	USY&TCo. and DG for CM&StP	141.50
	Do	USY&TCo. and DG for IC	111.00
	Do	USY&TCo. and AT&SF	.75
	Do	USY&TCo. and CB&Q	4.00
	Do	USY&TCo. and CRI&P	9.00
	Do	USY&TCo. and IC	8.50
	Do	USY&TCo. and CM&StP	12.25
	Do	USY&TCo. and DG for C&NW	471.25
	Do	USY&TCo. and C&NW	83.50
	W. A. Peterson, trading as Bacon, Peterson & Company	USY&TCo. and CGW	6.00
	Do	USY&TCo. and C&A	1.00
	Do	USY&TCo. and DG for C&A	104.00

	Complainants	Defendants	Amount
	Do	USY&TCo. and DG for CGW	76.00
	Do	USY&TCo. and DG for Erie	.25
	Do	USY&TCo. and PM	.25
	Do	USY&TCo. and DG for PM	.50
	Do	USY&TCo. and NYC	.25
	Do	USY&TCo. and DG for NYC	20.00
	Do	USY&TCo. and DG for CI&L	12.25
	Do	USY&TCo. and DG for PCC&StL and Penn	.25
	Do	USY&TCo. and GT	.25
	Do	USY&TCo. and Penn	.25
	Do	USY&TCo. and C&EI	.75
	Do	USY&TCo. and DG for C&EI	9.75
	Do	USY&TCo. and DG for Soo	.25
	Do	USY&TCo. and DG for AT&SF	172.75
	Do	USY&TCo. and DG for Wab	32.75
	Do	USY&TCo. and DG for GT	5.75
	Do	USY&TCo. and DG for NYC&StL	2.00
	Do	USY&TCo. and DG for Penn	1.75
	Do	USY&TCo. and DG for CRI&P	237.75
	Do	USY&TCo. and DG for CB&Q	246.50
	Do	USY&TCo. and DG for CM&StP	79.00
	Do	USY&TCo. and DG for IC	92.25
	Do	USY&TCo. and AT&SF	7.25
	Do	USY&TCo. and CB&Q	5.75
	Do	USY&TCo. and CRI&P	40.50
	Do	USY&TCo. and IC	.75
	Do	USY&TCo. and CM&StP	17.75
	Do	USY&TCo. and DG for C&NW	93.00
	Do	USY&TCo. and C&NW	31.25
	Bowles Livestock Commission Company	USY&TCo. and DG for B&O	38.75
	Do	USY&TCo. and CGW	43.00
	Do	USY&TCo. and C&A	11.75
	Do	USY&TCo. and DG for C&A	226.50
	Do	USY&TCo. and DG for CGW	270.00
348	Do	USY&TCo. and DG for Erie	$ 26.75
	Do	USY&TCo. and PM	.25
	Do	USY&TCo. and DG for PM	10.00
	Do	USY&TCo. and Erie	1.75
	Do	USY&TCo. and Wab	4.25
	Do	USY&TCo. and NYC	6.00
	Do	USY&TCo. and DG for NYC	102.50
	Do	USY&TCo. and CI&L	1.75
	Do	USY&TCo. and DG for CI&L	67.25
	Do	USY&TCo., PCC&StL, and Penn	6.00
	Do	USY&TCo. and DG for PCC&StL and Penn	62.50
	Do	USY&TCo. and NYC&StL	1.50
	Do	USY&TCo. and GT	2.50
	Do	USY&TCo. and Penn	18.50
	Do	USY&TCo. and Soo	15.00
	Do	USY&TCo. and MC	3.25
	Do	USY&TCo. and C&EI	9.50
	Do	USY&TCo. and DG for C&EI	206.50
	Do	USY&TCo. and DG for MC	22.50
	Do	USY&TCo. and DG for Soo	21.75
	Do	USY&TCo. and DG for AT&SF	236.25
	Do	USY&TCo. and DG for Wab	154.75
	Do	USY&TCo. and DG for GT	19.00
	Do	USY&TCo. and DG for NYC&StL	11.00

Complainants	Defendants	Amount
Do	USY&TCo. and DG for Penn	85.75
Do	USY&TCo. and DG for CRI&P	417.25
Do	USY&TCo. and DG for CB&Q	1560.00
Do	USY&TCo. and DG for CM&StP	894.50
Do	USY&TCo. and DG for IC	451.00
Do	USY&TCo. and AT&SF	24.25
Do	USY&TCo. and CB&Q	217.00
Do	USY&TCo. and CRI&P	28.50
Do	USY&TCo. and IC	24.75
Do	USY&TCo. and CM&StP	244.75
Do	USY&TCo. and DG for C&NW	1119.75
Do	USY&TCo. and C&NW	175.75
E. C. Brown and Seth B. St. John, copartners trading as Brown-St. John Company	USY&TCo. and DG for B&O	.50
Do	USY&TCo. and CGW	16.50
Do	USY&TCo. and DG for C&A	14.00
Do	USY&TCo. and DG for CGW	42.75
Do	USY&TCo. and DG for Erie	1.00
Do	USY&TCo. and PM	.25
Do	USY&TCo. and DG for PM	2.00
Do	USY&TCo. and Wab	.50
Do	USY&TCo. and NYC	1.25
Do	USY&TCo. and DG for NYC	33.25
Do	USY&TCo. and DG for CI&L	5.00
Do	USY&TCo. and DG for PCC&StL and Penn	7.75
Do	USY&TCo. and Soo	2.00
Do	USY&TCo. and C&EI	.50
Do	USY&TCo. and DG for C&EI	5.25
Do	USY&TCo. and DG for MC	.75
Do	USY&TCo. and DG for Soo	4.50
Do	USY&TCo. and DG for AT&SF	70.50
349 Do	USY&TCo. and DG for Wab	$ 9.50
Do	USY&TCo. and DG for GT	4.25
Do	USY&TCo. and DG for NYC&StL	2.00
Do	USY&TCo. and DG for Penn	4.25
Do	USY&TCo. and DG for CRI&P	209.50
Do	USY&TCo. and DG for CB&Q	376.25
Do	USY&TCo. and DG for CM&StP	457.25
Do	USY&TCo. and DG for IC	22.00
Do	USY&TCo. and CB&Q	23.25
Do	USY&TCo. and CRI&P	36.25
Do	USY&TCo. and IC	2.25
Do	USY&TCo. and CM&StP	98.25
Do	USY&TCo. and DG for C&NW	173.50
Do	USY&TCo. and C&NW	22.50
Thos. H. Brown	USY&TCo. and DG for CGW	.75
Do	USY&TCo. and NYC	.25
Do	USY&TCo. and DG for NYC	.75
Do	USY&TCo. and DG for C&EI	.75
Do	USY&TCo. and DG for AT&SF	6.00
Do	USY&TCo. and DG for CRI&P	8.75
Do	USY&TCo. and DG for CB&Q	93.00
Do	USY&TCo. and DG for CM&StP	.50
Do	USY&TCo. and AT&SF	1.75
Do	USY&TCo. and CB&Q	25.50
Do	USY&TCo. and CRI&P	1.50
Do	USY&TCo. and CM&StP.	3.50

	Complainants	Defendants	Amount
	George M. Brownson and J. L. Ettlinger, copartners, trading as Brownson & Ettlinger	USY&TCo. and DG for B&O	3.50
	Do	USY&TCo. and C&A	.25
	Do	USY&TCo. and DG for C&A	5.75
	Do	USY&TCo. and DG for CGW	4.25
	Do	USY&TCo. and DG for Erie	.25
	Do	USY&TCo. and PM	6.50
	Do	USY&TCo. and DG for PM	36.75
	Do	USY&TCo. and Erie	.25
	Do	USY&TCo. and Wab	.25
	Do	USY&TCo. and NYC	15.50
	Do	USY&TCo. and DG for NYC	106.00
	Do	USY&TCo. and CI&L	.25
	Do	USY&TCo. and DG for CI&L	6.75
	Do	USY&TCo., PCC&StL and Penn	.50
	Do	USY&TCo. and DG for PCC&StL and Penn	12.50
	Do	USY&TCo. and NYC&StL	.50
	Do	USY&TCo. and Penn	6.50
350	Do	USY&TCo. and Soo	$ 6.25
	Do	USY&TCo. and MC	5.50
	Do	USY&TCo. and C&EI	.75
	Do	USY&TCo. and DG for C&EI	28.50
	Do	USY&TCo. and DG for MC	38.25
	Do	USY&TCo. and DG for Soo	2.00
	Do	USY&TCo. and DG for AT&SF	30.75
	Do	USY&TCo. and DG for Wab	10.75
	Do	USY&TCo. and DG for GT	13.25
	Do	USY&TCo. and DG for NYC&StL	12.00
	Do	USY&TCo. and DG for Penn	45.50
	Do	USY&TCo. and DG for CRI&P	107.00
	Do	USY&TCo. and DG for CB&Q	155.50
	Do	USY&TCo. and DG for CM&StP	33.75
	Do	USY&TCo. and DG for IC	35.50
	Do	USY&TCo. and CB&Q	8.00
	Do	USY&TCo. and CRI&P	11.75
	Do	USY&TCo. and IC	1.25
	Do	USY&TCo. and DG for C&NW	81.25
	Do	USY&TCo. and C&NW	20.75
	Byers Brothers Company	USY&TCo. and DG for B&O	.50
	Do	USY&TCo. and CGW	11.75
	Do	USY&TCo. and DG for C&A	1.25
	Do	USY&TCo. and DG for CGW	39.00
	Do	USY&TCo. and DG for PM	.25
	Do	USY&TCo. and NYC	.75
	Do	USY&TCo. and DG for NYC	2.50
	Do	USY&TCo. and DG for CI&L	.50
	Do	USY&TCo. and DG for PCC&StL and Penn	6.25
	Do	USY&TCo. and GT	.75
	Do	USY&TCo. and Penn	.25
	Do	USY&TCo. and Soo	3.50
	Do	USY&TCo. and DG for C&EI	2.25
	Do	USY&TCo. and DG for MC	.50
	Do	USY&TCo. and DG for Soo	5.50
	Do	USY&TCo. and DG for AT&SF	138.00
	Do	USY&TCo. and DG for Wab	9.25
	Do	USY&TCo. and DG for GT	1.75
	Do	USY&TCo. and DG for NYC&StL	1.75

	Complainants	Defendants	Amount
	Do	USY&TCo. and DG for Penn	.50
	Do	USY&TCo. and DG for CRI&P	103.25
	Do	USY&TCo. and DG for CB&Q	333.00
	Do	USY&TCo. and DG for CM&StP	122.75
	Do	USY&TCo. and DG for IC	55.50
351	Do	USY&TCo. and AT&SF	$ 2.25
	Do	USY&TCo. and CB&Q	40.00
	Do	USY&TCo. and CRI&P	32.00
	Do	USY&TCo. and IC	7.50
	Do	USY&TCo. and CM&StP	19.50
	Do	USY&TCo. and DG for C&NW	200.25
	Do	USY&TCo. and CNW	44.25
	Wm. B. Swinney, Chas. M. Swinney and Thos. E. Swinney, copartners trading as Swinney Bros., successors to Brunker & Swinney	USY&TCo. and DG for B&O	.75
	Do	USY&TCo. and CGW	3.25
	Do	USY&TCo. and DG for C&A	7.50
	Do	USY&TCo. and DG for CGW	21.50
	Do	USY&TCo. and DG for Erie	.25
	Do	USY&TCo. and DG for PM	.75
	Do	USY&TCo. and Wab	.50
	Do	USY&TCo. and NYC	1.75
	Do	USY&TCo. and DG for NYC	3.50
	Do	USY&TCo. and CI&L	.50
	Do	USY&TCo. and DG for CI&L	28.00
	Do	USY&TCo. and DG for PCC&StL and Penn	.75
	Do	USY&TCo. and Soo	50.50
	Do	USY&TCo. and MC	.25
	Do	USY&TCo. and DG for C&EI	2.25
	Do	USY&TCo. and DG for MC	2.50
	Do	USY&TCo. and DG for Soo	163.75
	Do	USY&TCo. and DG for AT&SF	61.50
	Do	USY&TCo. and DG for Wab	116.25
	Do	USY&TCo. and DG for Penn	2.25
	Do	USY&TCo. and DG for CRI&P	204.00
	Do	USY&TCo. and DG for CB&Q	118.75
	Do	USY&TCo. and DG for CM&StP	290.00
	Do	USY&TCo. and DG for IC	100.00
	Do	USY&TCo. and AT&SF	3.00
	Do	USY&TCo. and CB&Q	14.75
	Do	USY&TCo. and CRI&P	28.00
	Do	USY&TCo. and IC	.25
	Do	USY&TCo. and CM&StP	66.25
	Do	USY&TCo. and DG for C&NW	365.00
	Do	USY&TCo. and C&NW	94.25
	J. B. Cahill, trading as J. B. Cahill & Company	USY&TCo. and DG for C&A	110.25
	Do	USY&TCo. and DG for CGW	21.50
	Do	USY&TCo. and DG for NYC	11.75
	Do	USY&TCo. and DG for CI&L	3.75
352	Do	USY&TCo. and DG for PCC&StL and Penn	5.75
	Do	USY&TCo. and DG for C&EI	84.75
	Do	USY&TCo. and DG for MC	10.50
	Do	USY&TCo. and DG for Soo	29.00
	Do	USY&TCo. and DG for AT&SF	17.00
	Do	USY&TCo. and DG for Wab	9.50

	Complainants	Defendants	Amount
	Do	USY&TCo. and DG for Penn	3.00
	Do	USY&TCo. and DG for CRI&P	29.75
	Do	USY&TCo. and DG for CB&Q	40.00
	Do	USY&TCo. and DG for CM&StP	76.75
	Do	USY&TCo. and DG for IC	70.50
	Do	USY&TCo. and CRI&P	2.25
	Do	USY&TCO. and DG for C&NW	57.75
	Central Livestock Commission Company	USY&TCo. and DG for B&O	2.50
	Do	USY&TCo. and CGW	38.50
	Do	USY&TCo. and DG for C&A	1.00
	Do	USY&TCo. and DG for CGW	192.00
	Do	USY&TCo. and DG for Erie	.50
	Do	USY&TCo. and DG for PM	1.50
	Do	USY&TCo. and Wab	1.50
	Do	USY&TCo. and DG for NYC	2.00
	Do	USY&TCo. and DG for CI&L	9.25
	Do	USY&TCo. and DG for PCC&St L and Penn	4.00
	Do	USY&TCo. and NYC&StL	.25
	Do	USY&TCo. and GT	.25
	Do	USY&TCo. and Soo	7.50
	Do	UST&TCo. and DG for C&EI	16.50
	Do	USY&TCo. and DG for MC	.75
	Do	USY&TCo. and DG for Soo	36.25
	Do	USY&TCo. and DG for AT&SF	47.75
	Do	USY&TCo. and DG for Wab	14.00
	Do	USY&TCo. and DG for GT	.50
	Do	USY&TCo. and DG for NYC&StL	.75
	Do	USY&TCo. and DG for Penn	17.00
	Do	USY&TCo. and DG for CRI&P	371.50
	Do	USY&TCo. and DG for CB&Q	122.00
	Do	USY&TCo. and DG for CM&StP	288.75
	Do	USY&TCo. and DG for IC	384.25
	Do	USY&TCo. and AT&SF	2.75
	Do	USY&TCo. and CB&Q	18.00
	Do	USY&TCo. and CRI&P	28.25
	Do	USY&TCo. and IC	41.75
	Do	USY&TCo. and CM&StP	24.75
	Do	USY&TCo. and DG for C&NW	334.50
	Do	USY&TCo. and C&NW	65.75
	Ernest Clark and Louis Armbrecht copartners trading as Clark, Armbrecht & Company	USY&TCo. and CGW	18.50
	Do	USY&TCo. and DG for CGW	43.25
	Do	USY&TCo. and DG for NYC	1.25
	Do	USY&TCo. and DG for C&EI	3.00
353	Do	USY&TCo. and DG for AT&SF	3.25
	Do	USY&TCo. and DG for Wab	.50
	Do	USY&TCo. and DG for CRI&P	23.25
	Do	USY&TCo. and DG for CB&Q	5.25
	Do	USY&TCo. and DG for CM&StP	27.75
	Do	USY&TCo. and DG for IC	16.00
	Do	USY&TCo. and CB&Q	1.75
	Do	USY&TCo. and CRI&P	5.75
	Do	USY&TCo. and IC	.75
	Do	USY&TCo. and CM&StP	5.50
	Do	USY&TCo. and DG for C&NW	196.00
	Do	USY&TCo. and C&NW	24.25

Complainants	Defendants	Amount
E. A. Clark, trading as Clark, Bowles & Company	USY&TCo. and DG for C&A	.75
Do	USY&TCo. and DG for CGW	4.25
Do	USY&TCo. and PM	.25
Do	USY&TCo. and DG for PM	.25
Do	USY&TCo. and NYC	.75
Do	USY&TCo. and DG for NYC	.50
Do	USY&TCo. and Soo	1.00
Do	USY&TCo. and C&EI	1.50
Do	USY&TCo. and DG for C&EI	1.50
Do	USY&TCo. and DG for Soo	2.50
Do	USY&TCo. and DG for Wab	.50
Do	USY&TCo. and DG for CRI&P	14.50
Do	USY&TCo. and DG for CB&Q	9.00
Do	USY&TCo. and DG for CM&StP	6.75
Do	USY&TCo. and DG for IC	37.75
Do	USY&TCo. and CB&Q	.50
Do	USY&TCo. and CRI&P	1.25
Do	USY&TCo. and IC	3.00
Do	USY&TCo. and DG for C&NW	7.00
Do	USY&TCo. and C&NW	2.75
John Clay, John G. Forrest, C. A. Kleman, F. H. Connor and C. L. Robinson, copartners trading as Clay, Robinson & Company	USY&TCo. and DG for B&O	18.00
Do	USY&TCo. and CGW	16.50
Do	USY&TCo. and C&A	16.75
Do	USY&TCo. and DG for C&A	171.25
Do	USY&TCo. and DG for CGW	279.00
Do	USY&TCo. and DG for Erie	32.75
Do	USY&TCo. and PM	15.00
Do	USY&TCo. and DG for PM	84.50
Do	USY&TCo. and Erie	3.00
Do	USY&TCo. and Wab	12.00
Do	USY&TCo. and NYC	18.50
Do	USY&TCo. and DG for NYC	106.50
Do	USY&TCo. and CI&L	3.00
Do	USY&TCo. and DG for CI&L	70.50
Do	USY&TCo., PCC&StL and Penn	8.00
354 Do	USY&TCo. and DG for PCC&StL and Penn	79.00
Do	USY&TCo. and NYC&StL	1.75
Do	USY&TCo. and GT	11.25
Do	USY&TCo. and Penn	10.00
Do	USY&TCo. and Soo	183.25
Do	USY&TCo. and MC	21.25
Do	USY&TCo. and C&EI	22.25
Do	USY&TCo. and DG for C&EI	212.75
Do	USY&TCo. and DG for MC	39.50
Do	USY&TCo. and DG for Soo	455.75
Do	USY&TCo. and DG for AT&SF	291.50
Do	USY&TCo. and DG for Wab	160.00
Do	USY&TCo. and DG for GT	70.50
Do	USY&TCo. and DG for NYC&StL	23.50
Do	USY&TCo. and DG for Penn	56.00
Do	USY&TCo. and DG for CRI&P	761.50
Do	USY&TCo. and DG for CB&Q	2042.25

Complainants	Defendants	Amount
Do	USY&TCo. and DG for CM&StP	1789.50
Do	USY&TCo. and DG for IC	456.75
Do	USY&TCo. and AT&SF	35.25
Do	USY&TCo. and CB&Q	637.00
Do	USY&TCo. and CRI&P	112.50
Do	USY&TCo. and IC	24.00
Do	USY&TCo. and CM&StP	405.50
Do	USY&TCo. and DG for C&NW	1929.75
Do	USY&TCo. and C&NW	306.50
James R. Clegg, trading as James R. Clegg & Company	USY&TCo. and CGW	1.50
Do	USY&TCo. and DG for C&A	1.50
Do	USY&TCo. and DG for CGW	17.00
Do	USY&TCo. and PM	2.50
Do	USY&TCo. and DG for PM	21.00
Do	USY&TCo. and NYC	.75
Do	USY&TCo. and DG for NYC	5.75
Do	USY&TCo. and DG for CI&L	.75
Do	USY&TCo. and DG for PCC&StL and Penn	1.25
Do	USY&TCo. and MC	1.25
Do	USY&TCo. and C&EI	1.25
Do	USY&TCo. and DG for C&EI	13.00
Do	USY&TCo. and DG for MC	6.00
Do	USY&TCo. and DG for Soo	7.50
Do	USY&TCo. and DG for AT&SF	28.00
Do	USY&TCo. and DG for Wab	2.75
Do	USY&TCo. and DG for Penn	1.75
Do	USY&TCo. and DG for CRI&P	52.25
Do	USY&TCo. and DG for CB&Q	46.00
Do	USY&TCo. and DG for CM&StP	46.75
Do	USY&TCo. and DG for IC	36.75
Do	USY&TCo. and CB&Q	1.50
Do	USY&TCo. and CRI&P	4.75
Do	USY&TCo. and IC	3.50
Do	USY&TCo. and CM&StP	11.75
Do	USY&TCo. and DG for C&NW	97.75
Do	USY&TCo. and C&NW	3.25
355 A. M. Henneberry and N. W. Cochran, copartners, trading as Cochran & Henneberry	USY&TCo. and DG for B&O	$ 16.75
Do	USY&TCo. and CGW	38.25
Do	USY&TCo. and DG for C&A	33.75
Do	USY&TCo. and DG for CGW	155.25
Do	USY&TCo. and DG for Erie	3.25
Do	USY&TCo. and PM	.25
Do	USY&TCo. and Erie	1.75
Do	USY&TCo. and WAB	.50
Do	USY&TCo. and DG for PM	17.25
Do	USY&TCo. and NYC	2.25
Do	USY&TCo. and DG for NYC	19.25
Do	USY&TCo. and DG for CI&L	1.75
Do	USY&TCo. and DG for PCC&StL and Penn	4.75
Do	USY&TCo. and NYC&StL	.25
Do	USY&TCo. and GT	3.50
Do	USY&TCo. and Penn	1.25
Do	USY&TCo. and Soo	1.50

	Complainants	Defendants	Amount
	Do	USY&TCo. and MC	.50
	Do	USY&TCo. and C&EI	.75
	Do	USY&TCo. and DG for C&EI	44.25
	Do	USY&TCo. and DG for MC	2.25
	Do	USY&TCo. and DG for Soo	7.50
	Do	USY&TCo. and DG for AT&SF	148.75
	Do	USY&TCo. and DG for WAB	107.50
	Do	USY&TCo. and C&NW	157.25
	Do	USY&TCo. and DG for GT	16.00
	Do	USY&TCo. and DG for NYC&StL	1.50
	Do	USY&TCo. and DG for Penn	9.50
	Do	USY&TCo. and DG for CRI&P	337.25
	Do	USY&TCo. and DG for CB&Q	492.00
	Do	USY&TCo. and DG for CM&StP	603.50
	Do	USY&TCo. and DG for IC	208.75
	Do	USY&TCo. and AT&SF	21.50
	Do	USY&TCo. and CB&Q	104.75
	Do	USY&TCo. and CRI&P	64.25
	Do	USY&TCo. and IC	30.00
	Do	USY&TCo. and CM&StP	138.25
	Do	USY&TCo. and DG for C&NW	626.00
	W. P. Collings, trading as W. P. Collings & Son	USY&TCo. and DG for Erie	.50
	Do	USY&TCo. and DG for PM	.25
	Do	USY&TCo. and NYC	1.75
	Do	USY&TCo. and DG for NYC	20.50
	Do	USY&TCo. and CI&L	1.50
	Do	USY&TCo. and DG for PCC&StL and Penn	8.50
	Do	USY&TCo. and NYC&StL	.75
	Do	USY&TCo. and Penn	.50
	Do	USY&TCo. and Soo	2.50
	Do	USY&TCo. and DG for C&EI	14.75
	Do	USY&TCo. and DG for MC	1.50
	Do	USY&TCo. and DG for Soo	.25
	Do	USY&TCo. and DG for AT&SF	3.00
	Do	USY&TCo. and DG for WAB	.75
	Do	USY&TCo. and DG for GT	3.50
356	Do	USY&TCo. and DG for CI&L	$ 9.25
	Do	USY&TCo. and DG for NYC&StL	3.25
	Do	USY&TCo. and DG for Penn	1.50
	Do	USY&TCo. and DG for CRI&P	7.75
	Do	USY&TCo. and DG for CB&Q	5.25
	Do	USY&TCo. and DG for CM&StP	1.50
	Do	USY&TCo. and CB&Q	1.00
	Do	USY&TCo. and CRI&P	.25
	Do	USY&TCo. and DG for C&NW	6.00
	Do	USY&TCo. and C&NW	.50
	Conklin Bros. Commission Company	USY&TCo. and DG for B&O	.50
	Do	USY&TCo. and CGW	4.25
	Do	USY&TCo. and DG for C&A	2.25
	Do	USY&TCo. and DG for CGW	22.00
	Do	USY&TCo. and DG for Erie	.25
	Do	USY&TCo. and DG for PM	2.25
	Do	USY&TCo. and NYC	1.50
	Do	USY&TCo. and DG for NYC	7.00
	Do	USY&TCo. and DG for PCC&StL and Penn	1.25
	Do	USY&TCo. and Penn	.25

	Complainants	Defendants	Amount
	Do	USY&TCo. and Soo	3.50
	Do	USY&TCo. and DG for C&EI	2.50
	Do	USY&TCo. and DG for MC	.25
	Do	USY&TCo. and DG for Soo	38.50
	Do	USY&TCo. and DG for AT&SF	32.50
	Do	USY&TCo. and DG for WAB	41.00
	Do	USY&TCo. and DG for GT	.50
	Do	USY&TCo. and DG for CI&L	.75
	Do	USY&TCo. and DG for NYC&StL	.25
	Do	USY&TCo. and DG for Penn	4.00
	Do	USY&TCo. and DG for CRI&P	102.00
	Do	USY&TCo. and DG for CB&Q	487.25
	Do	USY&TCo. and DG for CM&StP	183.00
	Do	USY&TCo. and DG for IC	120.25
	Do	USY&TCo. and AT&SF	.25
	Do	USY&TCo. and CB&Q	14.00
	Do	USY&TCo. and CRI&P	14.50
	Do	USY&TCo. and IC	7.00
	Do	USY&TCo. and CM&StP	27.75
	Do	USY&TCo. and DG for C&NW	486.00
	Do	USY&TCo. and C&NW	73.25
	H. D. Copeland & Company	USY&TCo. and DG for B&O	3.75
	Do	USY&TCo. and CGW	19.00
	Do	USY&TCo. and C&A	1.00
	Do	USY&TCo. and DG for C&A	10.75
	Do	USY&TCo. and DG for CGW	86.00
	Do	USY&TCo. and DG for Erie	20.75
	Do	USY&TCo. and PM	2.50
	Do	USY&TCo. and Erie	.25
	Do	USY&TCo. and DG for PM	9.25
	Do	USY&TCo. and NYC	3.75
	Do	USY&TCo. and DG for NYC	34.00
	Do	USY&TCo. and CI&L	1.00
	Do	USY&TCo., PCC&StL and Penn	1.75
	Do	USY&TCo. and DG for PCC&StL and Penn	46.25
357	Do	USY&TCo. and NYC&StL	$ 7.25
	Do	USY&TCo. and GT	1.00
	Do	USY&TCo. and Penn	1.00
	Do	USY&TCo. and Soo	1.00
	Do	USY&TCo. and MC	2.25
	Do	USY&TCo. and C&EI	1.25
	Do	USY&TCo. and DG for C&EI	27.25
	Do	USY&TCo. and DG for MC	2.50
	Do	USY&TCo. and DG for Soo	14.00
	Do	USY&TCo. and DG for AT&SF	21.75
	Do	USY&TCo. and DG for WAB	36.50
	Do	USY&TCo. and DG for GT	7.25
	Do	USY&TCo. and DG for CI&L	35.00
	Do	USY&TCo. and DG for NYC&StL	38.00
	Do	USY&TCo. and DG for Penn	12.75
	Do	USY&TCo. and DG for CRI&P	331.00
	Do	USY&TCo. and DG for CB&Q	162.50
	Do	USY&TCo. and DG for CM&StP	487.75
	Do	USY&TCo. and DG for IC	206.00
	Do	USY&TCo. and AT&SF	.50
	Do	USY&TCo. and CB&Q	41.00
	Do	USY&TCo. and CRI&P	40.50

Complainants	Defendants	Amount
Do	USY&TCo. and IC	9.25
Do	USY&TCo. and CM&StP	69.00
Do	USY&TCo. and DG for C&NW	430.50
Do	USY&TCo. and C&NW	61.75
J. M. Corrick	USY&TCo. and C&A	1.25
Do	USY&TCo. and DG for CGW	.50
Do	USY&TCo. and DG for Penn	.25
Do	USY&TCo. and DG for CRI&P	48.25
Do	USY&TCo. and DG for CB&Q	185.25
Do	USY&TCo. and DG for CM&StP	30.75
Do	USY&TCo. and CB&Q	58.75
Do	USY&TCo. and CRI&P	11.50
Do	USY&TCo. and CM&StP	5.00
Do	USY&TCo. and DG for C&NW	63.00
Do	USY&TCo. and C&NW	13.25
J. F. Cross and H. G. Sommers, copartners trading as Cross, Sommers & Company	USY&TCo. and CGW	3.50
Do	USY&TCo. and C&A	1.00
Do	USY&TCo. and DG for C&A	35.75
Do	USY&TCo. and DG for CGW	20.25
Do	USY&TCo. and DG for Erie	.50
Do	USY&TCo. and DG for PM	.25
Do	USY&TCo. and DG for NYC	2.00
Do	USY&TCo. and DG for PCC&StL and Penn	.50
Do	USY&TCo. and Soo	1.00
Do	USY&TCo. and C&EI	.25
Do	USY&TCo. and DG for C&EI	15.75
Do	USY&TCo. and DG for Soo	5.50
Do	USY&TCo. and DG for AT&SF	8.25
Do	USY&TCo. and DG for WAB	20.75
Do	USY&TCo. and DG for GT	1.50
Do	USY&TCo. and DG for CI&L	35.50
358 Do	USY&TCo. and DG for NYC&StL	$ .50
Do	USY&TCo. and DG for Penn	1.25
Do	USY&TCo. and DG for CRI&P	106.25
Do	USY&TCo. and DG for CB&Q	155.75
Do	USY&TCo. and DG for CM&StP	147.75
Do	USY&TCo. and DG for IC	81.00
Do	USY&TCo. and AT&SF	.75
Do	USY&TCo. and CB&Q	11.25
Do	USY&TCo. and CRI&P	22.00
Do	USY&TCo. and IC	3.50
Do	USY&TCo. and CM&StP	29.50
Do	USY&TCo. and DG for C&NW	148.75
Do	USY&TCo. and C&NW	25.75
A. B. Daniels	USY&TCo. and DG for B&O	.25
Do	USY&TCo. and CGW	2.75
Do	USY&TCo. and DG for C&A	1.75
Do	USY&TCo. and DG for CGW	5.75
Do	USY&TCo. and DG for Erie	.25
Do	USY&TCo. and DG for PCC&StL and Penn	.75
Do	USY&TCo. and GT	1.00
Do	USY&TCo. and DG for C&EI	1.00
Do	USY&TCo. and DG for Soo	4.75
Do	USY&TCo. and DG for AT&SF	12.75

Complainants	Defendants	Amount
Do	USY&TCo. and DG for Wab	1.50
Do	USY&TCo. and DG for GT	1.25
Do	USY&TCo. and DG for CI&L	2.00
Do	USY&TCo. and DG for Penn	.50
Do	USY&TCo. and DG for CRI&P	59.25
Do	USY&TCo. and DG for CB&Q	46.00
Do	USY&TCo. and DG for CM&StP	35.75
Do	USY&TCo. and DG for IC	93.50
Do	USY&TCo. and CRI&P	14.75
Do	USY&TCo. and IC	15.75
Do	USY&TCo. and CM&StP	2.00
Do	USY&TCo. and DG for C&NW	59.75
Do	USY&TCo. and C&NW	13.00
P. T. Dolan and Fred Ludeman, copartners trading as Dolan & Ludeman	USY&TCo. and DG for CGW	3.00
Do	USY&TCo. and DG for Wab	4.00
Do	USY&TCo. and DG for CRI&P	40.00
Do	USY&TCo. and DG for CB&Q	11.75
Do	USY&TCo. and DG for CM&StP	22.00
Do	USY&TCo. and DG for IC	4.25
359 J. M. Doud & Company	USY&TCo. and CGW	$27.25
Do	USY&TCo. and C&A	1.00
Do	USY&TCo. and DG for C&A	42.75
Do	USY&TCo. and DG for CGW	123.00
Do	USY&TCo. and DG for Erie	1.00
Do	USY&TCo. and PM	1.00
Do	USY&TCo. and Wab	1.00
Do	USY&TCo. and DG for PM	16.50
Do	USY&TCo. and DG for NYC	2.50
Do	USY&TCo. and PCC&StL and Penn	.25
Do	USY&TCo. and DG for PCC&StL and Penn	16.50
Do	USY&TCo. and Penn	.50
Do	USY&TCo. and Soo	.25
Do	USY&TCo. and C&EI	1.00
Do	USY&TCo. and DG for C&EI	69.00
Do	USY&TCo. and DG for MC	14.25
Do	USY&TCo. and DG for Soo	10.50
Do	USY&TCo. and DG for AT&SF	88.75
Do	USY&TCo. and DG for Wab	57.60
Do	USY&TCo. and DG for GT	2.75
Do	USY&TCo. and DG for CI&L	3.50
Do	USY&TCo. and DG for Penn	4.75
Do	USY&TCo. and DG for CRI&P	220.75
Do	USY&TCo. and DG for CB&Q	149.75
Do	USY&TCo. and DG for CM&StP	517.50
Do	USY&TCo. and DG for IC	67.50
Do	USY&TCo. and DG for C&NW	470.50
Do	USY&TCo. and C&NW	132.50
Do	USY&TCo. and AT&SF	1.25
Do	USY&TCo. and CB&Q	8.00
Do	USY&TCo. and CRI&P	15.75
Do	USY&TCo. and IC	5.00
Do	USY&TCo. and CM&StP	50.00

Complainants	Defendants	Amount
S. S. Driver, trading as S. S. Driver & Company	USY&TCo. and DG for C&EI	1.25
Do	USY&TCo. and DG for AT&SF	1.00
Do	USY&TCo. and DG for Wab	.25
Do	USY&TCo. and DG for CM&StP	94.00
Do	USY&TCo. and DG for IC	50.25
Do	USY&TCo. and AT&SF	2.00
Do	USY&TCo. and CB&Q	.25
Do	USY&TCo. and IC	4.75
Do	USY&TCo. and CM&StP	54.50
Do	USY&TCo. and DG for C&NW	2.50
Do	USY&TCo. and C&NW	8.00
Chas. R. Beason and P. E. Moore, copartners trading as Drovers Commission Company.	USY&TCo. and DG for B&O	.75
Do	USY&TCo. and C&A	.25
Do	USY&TCo. and DG for C&A	44.00
Do	USY&TCo. and DG for CGW	4.00
Do	USY&TCo. and DG for Erie	4.50
Do	USY&TCo. and PM	.25
Do	USY&TCo. and PM	.75
Do	USY&TCo. and Wab	.25
Do	USY&TCo. and DG for PM	6.50
Do	USY&TCo. and NYC	4.75
Do	USY&TCo. and DG for NYC	13.75
360 Do	USY&TCo. and CI&L	$ .75
Do	USY&TCo. and PCC&StL and Penn	3.00
Do	USY&TCo. and DG for PCC&St.L and Penn	51.25
Do	USY&TCo. and Penn	3.00
Do	USY&TCo. and Soo	1.75
Do	USY&TCo. and MC	3.75
Do	USY&TCo. and DG for C&EI	16.00
Do	USY&TCo. and DG for MC	7.50
Do	USY&TCo. and DG for Soo	6.00
Do	USY&TCo. and DG for AT&SF	23.25
Do	USY&TCo. and DG for Wab	441.75
Do	USY&TCo. and DG for C&NW	362.50
Do	USY&TCo. and C&NW	83.25
Do	USY&TCo. and DG for GT	3.00
Do	USY&TCo. and DG for CI&L	43.50
Do	USY&TCo. and DG for NYC&StL	2.00
Do	USY&TCo. and DG for Penn	21.50
Do	USY&TCo. and DG for CRI&P	121.00
Do	USY&TCo. and DG for CB&Q	304.50
Do	USY&TCo. and DG for CM&StP	74.00
Do	USY&TCo. and DG for IC	30.00
Do	USY&TCo. and AT&SF	2.50
Do	USY&TCo. and CB&Q	37.75
Do	USY&TCo. and CRI&P	5.75
Do	USY&TCo. and IC	2.50
Do	USY&TCo. and CM&StP	12.75
J. W. Eastland, trading as J. W. Eastland & Company	USY&TCo. and DG for B&O	1.00
Do	USY&TCo. and CGW	24.50
Do	USY&TCo. and C&A	13.00
Do	USY&TCo. and DG for C&A	8.25

	Complainants	Defendants	Amount
	Do	USY&TCo. and DG for CGW	148.50
	Do	USY&TCo. and DG for Erie	.25
	Do	USY&TCo. and PM	.75
	Do	USY&TCo. and Wab	.25
	Do	USY&TCo. and DG for PM	3.75
	Do	USY&TCo. and NYC	3.50
	Do	USY&TCo. and DG for NYC	21.00
	Do	USY&TCo. and PCC&StL and Penn	2.75
	Do	USY&TCo. and DG for PCC&StL and Penn	12.00
	Do	USY&TCo. and GT	.50
	Do	USY&TCo. and Penn	1.00
	Do	USY&TCo. and Soo	82.25
	Do	USY&TCo. and MC	26.75
	Do	USY&TCo. and C&EI	2.00
	Do	USY&TCo. and DG for C&EI	57.75
	Do	USY&TCo. and DG for MC	124.00
	Do	USY&TCo. and DG for Soo	147.75
	Do	USY&TCo. and DG for AT&SF	121.00
	Do	USY&TCo. and DG for Wab	57.00
	Do	USY&TCo. and DG for C&NW	933.75
	Do	USY&TCo. and C&NW	173.00
361	Do	USY&TCo. and DG for GT	$ 13.00
	Do	USY&TCo. and DG for CI&L	10.75
	Do	USY&TCo. and DG for NYC&StL	22.25
	Do	USY&TCo. and DG for Penn	4.50
	Do	USY&TCo. and DG for CRI&P	426.25
	Do	USY&TCo. and DG for CB&Q	579.25
	Do	USY&TCo. and DG for CM&StP	944.50
	Do	USY&TCo. and DG for IC	210.50
	Do	USY&TCo. and AT&SF	19.75
	Do	USY&TCo. and CB&Q	215.25
	Do	USY&TCo. and CRI&P	76.50
	Do	USY&TCo. and IC	14.25
	Do	USY&TCo. and CM&StP	226.50
	Guy Wheeler and T. K. Polley, copartners, trading as Emmett, Wheeler & Polley	USY&TCo. and DG for B&O	.25
	Do	USY&TCo. and CGW	48.50
	Do	USY&TCo. and DG for C&A	16.75
	Do	USY&TCo. and DG for CGW	261.50
	Do	USY&TCo. and WAB	.25
	Do	USY&TCo. and DG for PM	.25
	Do	USY&TCo. and DG for PCC&StL and Penn	1.00
	Do	USY&TCo. and DG for C&EI	8.00
	Do	USY&TCo. and DG for Soo	.25
	Do	USY&TCo. and DG for AT&SF	4.50
	Do	USY&TCo. and DG for NYC	1.25
	Do	USY&TCo. and DG for WAB	1.25
	Do	USY&TCo. and DG for GT	1.25
	Do	USY&TCo. and DG for CI&L	.50
	Do	USY&TCo. and DG for CRI&P	191.50
	Do	USY&TCo. and DG for CB&Q	61.75
	Do	USY&TCo. and DG for CM&StP	81.50
	Do	USY&TCo. and DG for IC	1.75
	Do	USY&TCo. and AT&SF	9.50
	Do	USY&TCo. and CB&Q	9.75
	Do	USY&TCo. and CRI&P	47.50
	Do	USY&TCo. and IC	.75

Complainants	Defendants	Amount
Do	USY&TCo. and CM&StP	2.00
Do	USY&TCo. and DG for C&NW	238.25
Do	USY&TCo. and C&NW	26.75
E. H. Kuenster, surviving partner of copartnership of Erwin & Kuenster	USY&TCo. and C&GW	11.00
Do	USY&TCo. and C&A	1.75
Do	USY&TCo. and NYC	.75
Do	USY&TCo. and Penn	.25
Do	USY&TCo. and DG for C&EI	.25
Do	USY&TCo. and AT&SF	6.25
Do	USY&TCo. and CB&Q	54.00
Do	USY&TCo. and CRI&P	61.00
Do	USY&TCo. and IC	20.50
Do	USY&TCo. and CM&StP	50.50
Do	USY&TCo. and DG for C&NW	4.75
Do	USY&TCo. and C&NW	102.75
362 Evans, Snider Buel Company	USY&TCo. and DG for B&O	$11.75
Do	USY&TCo. and C&GW	1.75
Do	USY&TCo. and C&A	1.50
Do	USY&TCo. and DG for C&A	34.75
Do	USY&TCo. and DG for Erie	3.00
Do	USY&TCo. and PM	1.00
Do	USY&TCo. and DG for PM	.50
Do	USY&TCo. and DG for CGW	41.00
Do	USY&TCo. and NYC	1.00
Do	USY&TCo. and DG for PCC&StL and Penn	2.25
Do	USY&TCo. and NYC&StL	.25
Do	USY&TCo. and GT	.75
Do	USY&TCo. and Soo	5.50
Do	USY&TCo. and C&EI	.50
Do	USY&TCo. and DG for C&EI	24.75
Do	USY&TCo. and DG for MC	.75
Do	USY&TCo. and DG for Soo	34.50
Do	USY&TCo. and DG for AT&SF	49.25
Do	USY&TCo. and DG for NYC	3.25
Do	USY&TCo. and DG for WAB	42.50
Do	USY&TCo. and DG for GT	7.00
Do	USY&TCo. and DG for CI&L	6.25
Do	USY&TCo. and DG for NYC&StL	1.25
Do	USY&TCo. and DG for Penn	3.00
Do	USY&TCo. and DG for CRI&P	410.00
Do	USY&TCo. and DG for CB&Q	380.00
Do	USY&TCo. and DG for CM&StP	204.50
Do	USY&TCo. and DG for IC	25.75
Do	USY&TCo. and DG for C&NW	163.75
Do	USY&TCo. and C&NW	23.50
Do	USY&TCo. and AT&SF	.75
Do	USY&TCo. and CB&Q	95.50
Do	USY&TCo. and CRI&P	52.50
Do	USY&TCo. and IC	3.25
Do	USY&TCo. and CM&StP	42.75
Filler, Wilson & McClelland	USY&TCo. and DG for B&O	.50
Do	USY&TCo. and C&GW	5.50
Do	USY&TCo. and C&A	1.75
Do	USY&TCo. and DG for C&A	32.75

	Complainants	Defendants	Amount
	Do	USY&TCo. and DG for Erie	.25
	Do	USY&TCo. and PM	1.25
	Do	USY&TCo. and WAB	.25
	Do	USY&TCo. and DG for PM	9.00
	Do	USY&TCo. and DG for CGW	18.00
	Do	USY&TCo. and DG for PCC&StL and Penn	.50
	Do	USY&TCo. and Penn	.25
	Do	USY&TCo. and Soo	30.50
	Do	USY&TCo. and DG for C&EI	6.00
	Do	USY&TCo. and DG for Soo	76.50
	Do	USY&TCo. and DG for AT&SF	43.25
	Do	USY&TCo. and DG for NYC	1.75
	Do	USY&TCo. and DG for WAB	3.25
	Do	USY&TCo. and DG for GT	.25
	Do	USY&TCo. and DG for CI&L	.50
	Do	USY&TCo. and DG for NYC&StL	.50
	Do	USY&TCo. and DG for Penn	.75
	Do	USY&TCo. and DG for CRI&P	71.00
	Do	USY&TCo. and DG for CB&Q	166.50
	Do	USY&TCo. and DG for CM&StP	377.50
	Do	USY&TCo. and DG for IC	90.75
	Do	USY&TCo. and DG for C&NW	324.75
	Do	USY&TCo. and C&NW	116.50
363	Do	USY&TCo. and AT&SF	$ 1.00
	Do	USY&TCo. and CB&Q	9.75
	Do	USY&TCo. and CRI&P	3.00
	Do	USY&TCo. and IC	3.50
	Do	USY&TCo. and CM&StP	116.75
	O. O. Freeland and C. M. Godfrey, copartners, trading as Freeland & Godfrey	USY&TCo. and C&GW	6.75
	Do	USY&TCo. and DG for C&A	2.50
	Do	USY&TCo. and PM	.25
	Do	USY&TCo. and DG for PM	.25
	Do	USY&TCo. and DG for CGW	28.75
	Do	USY&TCo. and NYC	1.00
	Do	USY&TCo. and DG for PCC&StL and Penn	.50
	Do	USY&TCo. and GT	.75
	Do	USY&TCo. and Soo	17.25
	Do	USY&TCo. and MC	3.00
	Do	USY&TCo. and DG for C&EI	.25
	Do	USY&TCo. and DG for MC	3.50
	Do	USY&TCo. and DG for Soo	28.00
	Do	USY&TCo. and DG for AT&SF	1.50
	Do	USY&TCo. and DG for NYC	1.50
	Do	USY&TCo. and DG for WAB	15.75
	Do	USY&TCo. and DG for GT	3.75
	Do	USY&TCo. and DG for NYC&StL	.50
	Do	USY&TCo. and DG for Penn	.75
	Do	USY&TCo. and DG for CRI&P	327.50
	Do	USY&TCo. and DG for CB&Q	99.00
	Do	USY&TCo. and DG for CM&StP	162.00
	Do	USY&TCo. and DG for IC	83.50
	Do	USY&TCo. and CB&Q	23.25
	Do	USY&TCo. and CRI&P	13.50
	Do	USY&TCo. and IC	11.25
	Do	USY&TCo. and CM&StP	15.75
	Do	USY&TCo. and DG for C&NW	254.75
	Do	USY&TCo. and C&NW	37.25

Complainants	Defendants	Amount
Fred Freeman, trading as Fred Freeman & Company	USY&TCo. and DG for B&O	.50
Do	USY&TCo. and C&GW	2.75
Do	USY&TCo. and C&A	.25
Do	USY&TCo. and DG for Erie	.25
Do	USY&TCo. and Erie	.50
Do	USY&TCo. and DG for CGW	2.00
Do	USY&TCo. and Penn	.25
Do	USY&TCo. and Soo	1.25
Do	USY&TCo. and DG for C&EI	3.50
Do	USY&TCo. and DG for Soo	1.00
Do	USY&TCo. and DG for AT&SF	.75
Do	USY&TCo. and DG for WAB	.50
Do	USY&TCo. and DG for NYC&StL	1.25
Do	USY&TCo. and DG for CRI&P	81.00
Do	USY&TCo. and DG for CB&Q	12.00
Do	USY&TCo. and DG for CM&StP	16.75
Do	USY&TCo. and DG for IC	8.00
Do	USY&TCo. and CB&Q	4.25
Do	USY&TCo. and CRI&P	8.00
Do	USY&TCo. and CM&StP	6.50
Do	USY&TCo. and DG for C&NW	35.75
Do	USY&TCo. and C&NW	14.75
364 P. J. Fitzgerald and G. S. Freeman, copartners trading as Freeman, Fitzgerald & Company	USY&TCo. and DG for B&O	$1.50
Do	USY&TCo. and C&GW	2.25
Do	USY&TCo. and C&A	1.00
Do	USY&TCo. and DG for C&A	48.00
Do	USY&TCo. and DG for Erie	.50
Do	USY&TCo. and PM	.25
Do	USY&TCo. and WAB	.25
Do	USY&TCo. and DG for PM	.25
Do	USY&TCo. and DG for CGW	52.75
Do	USY&TCo. and DG for PCC&StL and Penn	3.75
Do	USY&TCo. and Penn	.50
Do	USY&TCo. and MC	2.00
Do	USY&TCo. and C&EI	.50
Do	USY&TCo. and DG for C&EI	22.75
Do	USY&TCo. and DG for MC	5.00
Do	USY&TCo. and DG for Soo	3.75
Do	USY&TCo. and DG for AT&SF	16.25
Do	USY&TCo. and DG for NYC	5.25
Do	USY&TCo. and DG for WAB	19.50
Do	USY&TCo. and DG for GT	.50
Do	USY&TCo. and DG for CI&L	9.50
Do	USY&TCo. and DG for NYC&StL	1.50
Do	USY&TCo. and DG for Penn	7.50
Do	USY&TCo. and DG for CRI&P	33.75
Do	USY&TCo. and DG for CB&Q	105.75
Do	USY&TCo. and DG for CM&StP	194.24
Do	USY&TCo. and DG for IC	88.50
Do	USY&TCo. and DG for C&NW	155.25
Do	USY&TCo. and C&NW	9.50
Do	USY&TCo. and CB&Q	5.00
Do	USY&TCo. and CRI&P	.50
Do	USY&TCo. and IC	.50
Do	USY&TCo. and CM&StP	51.00

Complainants	Defendants	Amount
Wm. Gentleman, A. M. Gentleman, C. F. Gentleman and J. G. Gentleman, copartners trading as Wm. Gentleman & Sons	USY&TCo. and DG for B&O	.75
Do	USY&TCo. and C&GW	7.75
Do	USY&TCo. and DG for C&GW	71.50
Do	USY&TCo. and DG for Erie	11.00
Do	USY&TCo. and Erie	.25
Do	USY&TCo. and DG for PM	3.50
Do	USY&TCo. and DG for CGW	135.75
Do	USY&TCo. and NYC	.50
Do	USY&TCo., PCC&StL and Penn	.50
Do	USY&TCo. and DG for PCC&StL and Penn	46.25
Do	USY&TCo. and NYC&StL	.25
Do	USY&TCo. and Penn	1.25
Do	USY&TCo. and DG for C&EI	1.25
Do	USY&TCo. and DG for MC	.25
Do	USY&TCo. and DG for Soo	6.50
Do	USY&TCo. and DG for AT&SF	9.00
Do	USY&TCo. and DG for NYC	6.00
Do	USY&TCo. and DG for WAB	3.75
Do	USY&TCo. and DG for GT	1.00
Do	USY&TCo. and DG for CI&L	8.75
Do	USY&TCo. and DG for NYC&StL	6.50
Do	USY&TCo. and DG for Penn	6.50
Do	USY&TCo. and DG for CRI&P	171.25
Do	USY&TCo. and DG for CB&Q	210.25
Do	USY&TCo. and DG for CM&StP	339.00
Do	USY&TCo. and DG for IC	89.50
Do	USY&TCo. and DG for C&NW	675.00
Do	USY&TCo. and C&NW	61.00
Do	USY&TCo. and AT&SF	.50
Do	USY&TCo. and CB&Q	6.75
Do	USY&TCo. and CRI&P	23.25
Do	USY&TCo. and IC	3.25
Do	USY&TCo. and CM&StP	28.25
365 S. G. Gillogly, R. E. Gillogly, F. G. Gillogly and F. T. Gillogly, copartners trading as Gillogly & Company	USY&TCo. and DG for B&O	$1.00
Do	USY&TCo. and C&GW	1.25
Do	USY&TCo. and DG for C&A	10.75
Do	USY&TCo. and DG for Erie	26.25
Do	USY&TCo. and PM	.50
Do	USY&TCo. and Erie	.25
Do	USY&TCo. and WAB	.50
Do	USY&TCo. and DG for PM	3.00
Do	USY&TCo. and DG for CGW	17.00
Do	USY&TCo. and NYC	4.00
Do	USY&TCo. and CIL	2.25
Do	USY&TCo. and DG for PCC&StL and Penn	11.25
Do	USY&TCo. and Penn	.25
Do	USY&TCo. and Soo	.50
Do	USY&TCo. and C&EI	3.50
Do	USY&TCo. and DG for C&EI	162.75
Do	USY&TCo. and DG for Soo	1.00

Complainants	Defendants	Amount
Do	USY&TCo. and DG for AT&SF	2.75
Do	USY&TCo. and DG for NYC	55.75
Do	USY&TCo. and DG for WAB	25.75
Do	USY&TCo. and DG for GT	.25
Do	USY&TCo. and DG for CI&L	40.00
Do	USY&TCo. and DG for NYC&StL	11.25
Do	USY&TCo. and DG for Penn	6.00
Do	USY&TCo. and DG for CRI&P	24.00
Do	USY&TCo. and DG for CB&Q	88.25
Do	USY&TCo. and DG for CM&StP	171.00
Do	USY&TCo. and DG for IC	28.25
Do	USY&TCo. and CB&Q	1.00
Do	USY&TCo. and CRI&P	.25
Do	USY&TCo. and IC	3.00
Do	USY&TCo. and CM&StP	18.25
Do	USY&TCo. and DG for C&NW	231.00
Do	USY&TCo. and C&NW	46.25
Chas. E. Harding, trading as Chas. E. Harding & Company	USY&TCo. and DG for B&O	.50
Do	USY&TCo. and C&GW	6.25
Do	USY&TCo. and DG for C&A	10.00
Do	USY&TCo. and DG for Erie	.50
Do	USY&TCo. and DG for CGW	69.50
Do	USY&TCo. and NYC	.75
Do	USY&TCo., PCC&StL and Penn	.25
Do	USY&TCo. and Soo	29.75
Do	USY&TCo. and DG for C&EI	12.75
Do	USY&TCo. and DG for MC	.75
Do	USY&TCo. and DG for Soo	166.50
Do	USY&TCo. and DG for AT&SF	9.00
Do	USY&TCo. and DG for NYC	4.00
Do	USY&TCo. and DG for WAB	15.25
Do	USY&TCo. and DG for GT	8.50
Do	USY&TCo. and DG for CI&L	4.25
Do	USY&TCo. and DG for NYC&StL	1.25
Do	USY&TCo. and DG for Penn	2.25
Do	USY&TCo. and CRI&P	86.00
Do	USY&TCo. and DG for CB&Q	77.50
Do	USY&TCo. and DG for CM&StP	499.00
Do	USY&TCo. and DG for IC	227.25
Do	USY&TCo. and AT&SF	7.25
Do	USY&TCo. and CB&Q	1.00
Do	USY&TCo. and CRI&P	.50
Do	USY&TCo. and IC	33.50
Do	USY&TCo. and CM&StP	54.50
Do	USY&TCo. and C&NW	51.50
Do	USY&TCo. and DG for C&NW	401.25
366 Hefner Commission Company	USY&TCo. and CGW	$ 9.50
Do	USY&TCo. and DG for C&A	1.50
Do	USY&TCo. and DG for PM	.25
Do	USY&TCo. and DG for CGW	29.25
Do	USY&TCo. and NYC	.25
Do	USY&TCo. and CIL	.50
Do	USY&TCo. and DG for PCC&StL and Penn	1.00
Do	USY&TCo. and Soo	.50
Do	USY&TCo. and C&EI	2.75
Do	USY&TCo. and DG for C&EI	47.50

Complainants	Defendants	Amounts
Do	USY&TCo. and DG for MC	.25
Do	USY&TCo. and DG for Soo	.75
Do	USY&TCo. and DG for AT&SF	3.25
Do	USY&TCo. and DG for NYC	3.00
Do	USY&TCo. and DG for WAB	14.00
Do	USY&TCo. and DG for GT	.75
Do	USY&TCo. and DG for CI&L	29.25
Do	USY&TCo. and DG for Penn	.50
Do	USY&TCo. and DG for CRI&P	152.75
Do	USY&TCo. and DG for CB&Q	38.25
Do	USY&TCo. and DG for CM&StP	318.00
Do	USY&TCo. and DG for IC	124.75
Do	USY&TCo. and CB&Q	3.25
Do	USY&TCo. and CRI&P	15.50
Do	USY&TCo. and IC	5.25
Do	USY&TCo. and CM&StP	54.00
Do	USY&TCo. and DG for C&NW	179.25
Do	USY&TCo. and C&NW	33.00
Geo. F. Hogan, trading as Geo. F. Hogan & Company	USY&TCo. and DG for C&A	28.75
Do	USY&TCo. and DG for PM	.50
Do	USY&TCo. and DG for GT	.25
Do	USY&TCo. and DG for AT&SF	23.00
Do	USY&TCo. and DG for NYC	.25
Do	USY&TCo. and DG for Penn	.25
Do	USY&TCo. and DG for CRI&P	14.75
Do	USY&TCo. and DG for CB&Q	.50
Do	USY&TCo. and DG for CM&StP	.75
Do	USY&TCo. and CRI&P	2.00
A. Warheimer, E. H. Ingwerson, J. H. Ingwerson, Dan R. Ingwerson, D. C. Mosier, and A. C. Barroff, copartners trading as Ingwerson Bros.	USY&TCo. and CGW	2.75
Do	USY&TCo. and DG for C&A	7.25
Do	USY&TCo. and DG forCGW	16.25
Do	USY&TCo. and Soo	7.50
Do	USY&TCo. and C&EI	1.25
Do	USY&TCo. and DG for C&EI	2.75
Do	USY&TCo. and DG for Soo	15.00
Do	USY&TCo. and DG for WAB	1.00
Do	USY&TCo. and DG for CRI&P	64.50
Do	USY&TCo. and DG for CB&Q	24.25
Do	USY&TCo. and DG for CM&StP	341.75
Do	USY&TCo. and DG for IC	74.75
Do	USY&TCo. and CB&Q	6.25
Do	USY&TCo. and CRI&P	14.00
Do	USY&TCo. and IC	8.00
Do	USY&TCo. and CM&StP	44.50
Do	USY&TCo. and DG for C&NW	704.75
Do	USY&TCo. and C&NW	150.75
367 C. A. Ingwerson	USY&TCo. and Soo	$ 2.75
Do	USY&TCo. and DG for C&EI	.75
Do	USY&TCo. and DG for CRI&P	20.00
Do	USY&TCo. and DG for CM&StP	31.75
Do	USY&TCo. and CB&Q	.25

Complainants	Defendants	Amounts
Do	USY&TCo. and CRI&P	1.00
Do	USY&TCo. and IC	2.00
Do	USY&TCo. and CM&StP	11.50
Do	USY&TCo. and DG for C&NW	73.25
Do	USY&TCo. and C&NW	29.00
Iowa Livestock Commission Company	USY&TCo. and DG for B&O	.25
Do	USY&TCo. and C&GW	3.00
Do	USY&TCo. and C&A	1.25
Do	USY&TCo. and DG for C&A	114.00
Do	USY&TCo. and DG for Erie	1.25
Do	USY&TCo. and Erie	.50
Do	USY&TCo. and WAB	.50
Do	USY&TCo. and DG for PM	1.75
Do	USY&TCo. and DG for CGW	26.50
Do	USY&TCo. and NYC	.75
Do	USY&TCo. and CIL	.25
Do	USY&TCo. and DG for PCC&StL and Penn	.50
Do	USY&TCo. and Penn	.25
Do	USY&TCo. and C&EI	.25
Do	USY&TCo. and DG for C&EI	26.25
Do	USY&TCo. and DG for MC	1.50
Do	USY&TCo. and DG for Soo	4.25
Do	USY&TCo. and DG for AT&SF	168.75
Do	USY&TCo. and DG for NYC	26.25
Do	USY&TCo. and DG for WAB	94.50
Do	USY&TCo. and DG for GT	2.00
Do	USY&TCo. and DG for CI&L	10.25
Do	USY&TCo. and DG for NYC&StL	1.25
Do	USY&TCo. and DG for Penn	.25
Do	USY&TCo. and DG for CRI&P	100.25
Do	USY&TCo. and DG for CB&Q	206.25
Do	USY&TCo. and DG for CM&StP	122.50
Do	USY&TCo. and DG for IC	55.00
Do	USY&TCo. and AT&SF	1.75
Do	USY&TCo. and CB&Q	31.00
Do	USY&TCo. and CRI&P	20.50
Do	USY&TCo. and IC	10.25
Do	USY&TCo. and CM&StP	37.00
Do	USY&TCo. and DG for C&NW	104.00
Do	USY&TCo. and C&NW	23.50
I. W. Knettle and Edwin Knettle, copartners trading as Knettle Bros.	USY&TCo. and DG for B&O	.50
Do	USY&TCo. and C&GW	3.00
Do	USY&TCo. and DG for C&A	.50
Do	USY&TCo. and DG for CGW	28.75
Do	USY&TCo. and Soo	.50
Do	USY&TCo. and DG for CRI&P	3.50
Do	USY&TCo. and DG for C&NW	1.50
Do	USY&TCo. and C&NW	1.00
368 Knollen Sheep Commission Company	USY&TCo. and CGW	$ 3.00
Do	USY&TCo. and DG for C&A	2.00
Do	USY&TCo. and DG for Erie	1.25
Do	USY&TCo. and PM	1.25
Do	USY&TCo. and Erie	.50
Do	USY&TCo. and DG for PM	1.25

	Complainants	Defendants	Amount
	Do	USY&TCo. and DG for CGW	47.75
	Do	USY&TCo. and NYC	2.00
	Do	USY&TCo. and CI&L	1.50
	Do	USY&TCo. and DG for PCC&StL and Penn	4.25
	Do	USY&TCo. and GT	2.00
	Do	USY&TCo. and Penn	.25
	Do	USY&TCo. and Soo	25.25
	Do	USY&TCo. and MC	1.25
	Do	USY&TCo. and C&EI	3.00
	Do	USY&TCo. and DG for C&EI	9.25
	Do	USY&TCo. and DG for MC	1.00
	Do	USY&TCo. and DG for Soo	79.00
	Do	USY&TCo. and DG for AT&SF	34.50
	Do	USY&TCo. and DG for NYC	14.00
	Do	USY&TCo. and DG for WAB	9.00
	Do	USY&TCo. and DG for GT	6.75
	Do	USY&TCo. and DG for CI&L	15.00
	Do	USY&TCo. and DG for NYC&StL	2.25
	Do	USY&TCo. and DG for Penn	1.25
	Do	USY&TCo. and DG for CRI&P	40.50
	Do	USY&TCo. and DG for CB&Q	179.50
	Do	USY&TCo. and DG for CM&StP	371.00
	Do	USY&TCo. and DG for IC	18.50
	Do	USY&TCo. and CB&Q	35.75
	Do	USY&TCo. and CRI&P	2.50
	Do	USY&TCo. and IC	.50
	Do	USY&TCo. and CM&StP	153.25
	Do	USY&TCo. and DG for C&NW	343.75
	Do	USY&TCo. and C&NW	73.75
	E. H. Kuenster, trading as Kuenster Livestock Commission Company	USY&TCo. and DG for B&O	2.25
	Do	USY&TCo. and DG for C&A	18.50
	Do	USY&TCo. and DG for Erie	4.00
	Do	USY&TCo. and DG for PM	.25
	Do	USY&TCo. and DG for CGW	106.00
	Do	USY&TCo. and DG for C&EI	2.50
	Do	USY&TCo. and DG for MC	2.50
	Do	USY&TCo. and DG for Soo	6.25
	Do	USY&TCo. and DG for AT&SF	55.50
	Do	USY&TCo. and DG for NYC	7.00
	Do	USY&TCo. and DG for PCC&StL and Penn	2.50
	Do	USY&TCo. and DG for WAB	40.50
	Do	USY&TCo. and DG for GT	1.00
	Do	USY&TCo. and DG for CI&L	1.00
	Do	USY&TCo. and DG for NYC&StL	.25
	Do	USY&TCo. and DG for Penn	6.25
369	Do	USY&TCo. and DG for CRI&P	$ 364.25
	Do	USY&TCo. and DG for CB&Q	374.75
	Do	USY&TCo. and DG for CM&StP	240.50
	Do	USY&TCo. and DG for IC	128.75
	Do	USY&TCo. and DG for C&NW	566.00
	A. J. Laberthe	USY&TCo. and DG for B&O	3.00
	Do	USY&TCo. and DG for C&EI	11.50
	Do	USY&TCo. and DG for NYC	2.50
	Do	USY&TCo. and DG for WAB	1.50
	Do	USY&TCo. and DG for CRI&P	.75
	Do	USY&TCo. and DG for CB&Q	1.25
	Do	USY&TCo. and DG for CM&STP	6.75
	Do	USY&TCo. and DG for C&NW	27.25

	Complainants	Defendants	Amount
	L. S. Larrison, trading as L. S. Larrison & Company		
	Do	USY&TCo. and Soo	.25
	Do	USY&TCo. and DG for CRI&P	.25
	Do	USY&TCo. and CRI&P	.25
	Lee Livestock Commission Company	USY&TCo. and DG for B&O	1.25
	Do	USY&TCo. and C&GW	3.50
	Do	USY&TCo. and C&A	.50
	Do	USY&TCo. and DG for C&A	57.75
	Do	USY&TCo. and DG for Erie	3.00
	Do	USY&TCo. and PM	.25
	Do	USY&TCo. and WAB	.50
	Do	USY&TCo. and DG for PM	3.25
	Do	USY&TCo. and DG for CGW	69.75
	Do	USY&TCo. and NYC	4.50
	Do	USY&TCo. and CI&L	.75
	Do	USY&TCo. and DG for AT&SF	232.00
	Do	USY&TCo. and PCC&StL and Penn	2.00
	Do	USY&TCo. and Penn	4.75
	Do	USY&TCo. and DG for C&EI	5.25
	Do	USY&TCo. and DG for MC	2.50
	Do	USY&TCo. and DG for Soo	6.50
	Do	USY&TCo. and DG for NYC	16.50
	Do	USY&TCo. and DG for PCC&StL and Penn	13.50
	Do	USY&TCo. and DG for WAB	51.25
	Do	USY&TCo. and DG for GT	7.00
	Do	USY&TCo. and DG for CI&L	95.50
	Do	USY&TCo. and DG for NYC&StL	2.25
	Do	USY&TCo. and DG for Penn	2.75
	Do	USY&TCo. and DG for CRI&P	238.00
	Do	USY&TCo. and DG for CB&Q	713.50
	Do	USY&TCo. and DG for CM&StP	389.75
	Do	USY&TCo. and DG for IC	170.75
	Do	USY&TCo. and AT&SF	23.25
	Do	USY&TCo. and CB&Q	157.25
	Do	USY&TCo. and CRI&P	32.00
	Do	USY&TCo. and IC	18.25
	Do	USY&TCo. and CM&StP	67.25
	Do	USY&TCo. and DG for C&NW	581.75
	Do	USY&TCo. and C&NW	110.00
	F. C. Ludeman, trading as F. C. Ludeman & Company		
370	Do	USY&TCo. and DG for CGW	$1.00
	Do	USY&TCo. and DG for C&EI	1.25
	Do	USY&TCo. and DG for NYC	2.00
	Do	USY&TCo. and DG for NYC&StL	3.75
	Do	USY&TCo. and DG for CRI&P	131.00
	Do	USY&TCo. and DG for CB&Q	8.75
	Do	USY&TCo. and DG for CM&StP	38.00
	Do	USY&TCo. and CB&Q	4.75
	Do	USY&TCo. and CRI&P	18.25
	Do	USY&TCo. and CM&StP	15.50
	Do	USY&TCo. and DG for C&NW	38.25
	Do	USY&TCo. and C&NW	13.25
	McCausland Hoag & Vaughn	USY&TCo. and DG for B&O	23.00
	Do	USY&TCo. and C&GW	7.50

	Complainants	Defendants	Amounts
	Do	USY&TCo. and C&A	1.00
	Do	USY&TCo. and DG for C&A	171.25
	Do	USY&TCo. and DG for Erie	.25
	Do	USY&TCo. and PM	.50
	Do	USY&TCo. and WAB	.25
	Do	USY&TCo. and DG for PM	1.75
	Do	USY&TCo. and DG for CGW	48.75
	Do	USY&TCo. and NYC	1.50
	Do	USY&TCo. and DG for AT&SF	140.50
	Do	USY&TCo. and PCC&StL and Penn	.26
	Do	USY&TCo. and GT	4.25
	Do	USY&TCo. and Penn	.25
	Do	USY&TCo. and Soo	2.50
	Do	USY&TCo. and MC	4.25
	Do	USY&TCo. and C&EI	1.50
	Do	USY&TCo. and DG for C&EI	65.25
	Do	USY&TCo. and DG for MC	2.00
	Do	USY&TCo. and DG for Soo	2.25
	Do	USY&TCo. and DG for NYC	18.00
	Do	USY&TCo. and DG for PCC&StL and Penn	11.50
	Do	USY&TCo. and DG for WAB	96.25
	Do	USY&TCo. and DG for GT	14.50
	Do	USY&TCo. and DG for CI&L	38.50
	Do	USY&TCo. and DG for NYC&StL	6.25
	Do	USY&TCo. and DG for Penn	3.50
	Do	USY&TCo. and DG for CRI&P	369.50
	Do	USY&TCo. and DG for CB&Q	353.75
	Do	USY&TCo. and DG for CM&StP	304.50
	Do	USY&TCo. and DG for IC	336.75
	Do	USY&TCo. and AT&SF	10.00
	Do	USY&TCo. and CB&Q	39.25
	Do	USY&TCo. and CRI&P	45.50
	Do	USY&TCo. and IC	8.75
	Do	USY&TCo. and CM&StP	41.00
	Do	USY&TCo. and DG for C&NW	419.25
	Do	USY&TCo. and C&NW	82.25
371	Wm. Mahoney	USY&TCo. and CGW	$ 8.00
	Do	USY&TCo. and DG for C&A	2.50
	Do	USY&TCo. and PM	.50
	Do	USY&TCo. and DG for PM	.25
	Do	USY&TCo. and DG for CGW	21.00
	Do	USY&TCo. and NYC	1.00
	Do	USY&TCo. and Soo	1.50
	Do	USY&TCo. and MC	1.50
	Do	USY&TCo. and C&EI	3.50
	Do	USY&TCo. and DG for C&EI	.50
	Do	USY&TCo. and DG for MC	.50
	Do	USY&TCo. and DG for Soo	.75
	Do	USY&TCo. and DG for NYC	2.50
	Do	USY&TCo. and DG for WAB	.50
	Do	USY&TCo. and DG for Penn	.25
	Do	USY&TCo. and DG for CRI&P	102.00
	Do	USY&TCo. and DG for CB&Q	51.25
	Do	USY&TCo. and DG for CM&StP	79.00
	Do	USY&TCo. and DG for IC	20.50
	Do	USY&TCo. and CB&Q	7.25
	Do	USY&TCo. and CRI&P	26.75
	Do	USY&TCo. and IC	5.25

Complainants	Defendants	Amount
Do	USY&TCo. and CM&StP	53.50
Do	USY&TCo. and DG for C&NW	42.50
Do	USY&TCo. and C&NW	15.75
J. P. Maley and Harry L. Carpenter, copartners trading as Maley, Carpenter & Company	USY&TCo. and CGW	.75
Do	USY&TCo. and DG for C&A	.75
Do	USY&TCo. and DG for CGW	15.50
Do	USY&TCo. and DG for AT&SF	62.25
Do	USY&TCo. and MC	.25
Do	USY&TCo. and C&EI	.25
Do	USY&TCo. and DG for C&EI	1.00
Do	USY&TCo. and DG for MC	1.75
Do	USY&TCo. and DG for NYC	4.50
Do	USY&TCo. and DG for PCC&StL and Penn	3.50
Do	USY&TCo. and DG for GT	.50
Do	USY&TCo. and DG for Penn	3.25
Do	USY&TCo. and DG for CRI&P	82.50
Do	USY&TCo. and DG for CB&Q	385.50
Do	USY&TCo. and DG for CM&StP	33.75
Do	USY&TCo. and DG for IC	47.75
Do	USY&TCo. and CB&Q	26.50
Do	USY&TCo. and CRI&P	1.50
Do	USY&TCo. and IC	4.00
Do	USY&TCo. and CM&StP	3.50
Do	USY&TCo. and DG for C&NW	144.75
Do	USY&TCo. and C&NW	30.75
372 John P. Martin, James G. Martin, George E. Martin and Wm. S. Burmister, copartners trading as Martin Bros. & Company	USY&TCo. and DG for B&O	$ .25
Do	USY&TCo. and CGW	6.50
Do	USY&TCo. and DG for C&A	3.00
Do	USY&TCo. and DG for Erie	3.75
Do	USY&TCo. and PM	.75
Do	USY&TCo. and Erie	.75
Do	USY&TCo. and WAB	.50
Do	USY&TCo. and DG for PM	1.25
Do	USY&TCo. and DG for CGW	48.75
Do	USY&TCo. and NYC	.27
Do	USY&TCo. and DG for AT&SF	56.75
Do	USY&TCo. and GT	.25
Do	USY&TCo. and Soo	.50
Do	USY&TCo. and MC	.25
Do	USY&TCo. and DG for C&EI	19.75
Do	USY&TCo. and DG for MC	1.25
Do	USY&TCo. and DG for Soo	4.75
Do	USY&TCo. and DG for NYC	15.25
Do	USY&TCo. and DG for PCC&StL and Penn	1.75
Do	USY&TCo. and DG for WAB	1.25
Do	USY&TCo. and DG for CI&L	7.50
Do	USY&TCo. and DG for CRI&P	348.75
Do	USY&TCo. and DG for CB&Q	1206.75
Do	USY&TCo. and DG for CM&StP	212.25
Do	USY&TCo. and DG for IC	41.50
Do	USY&TCo. and DG for C&NW	310.50

Complainants	Defendants	Amount
Do	USY&TCo. and C&NW	53.00
Do	USY&TCo. and AT&SF	3.25
Do	USY&TCo. and CB&Q	161.00
Do	USY&TCo. and CRI&P	33.00
Do	USY&TCo. and IC	1.25
Do	USY&TCo. and CM&StP	57.50
373 Muller, White & Woods	USY&TCo. and DG for B&O	$ .75
Do	USY&TCo. and CGW	7.75
Do	USY&TCo. and C&A	.50
Do	USY&TCo. and DG for C&A	74.75
Do	USY&TCo. and DG for Erie	1.75
Do	USY&TCo. and PM	.50
Do	USY&TCo. and WAB	.25
Do	USY&TCo. and DG for PM	4.25
Do	USY&TCo. and DG for CGW	133.00
Do	USY&TCo. and NYC	.50
Do	USY&TCo. and CI&L	1.25
Do	USY&TCo. and DG for AT&SF	194.75
Do	USY&TCo. and PCC&StL and Penn	.75
Do	USY&TCo. and Penn	.25
Do	USY&TCo. and Soo	.50
Do	USY&TCo. and MC	.25
Do	USY&TCo. and C&EI	4.75
Do	USY&TCo. and DG for C&EI	93.25
Do	USY&TCo. and DG for MC	1.50
Do	USY&TCo. and DG for Soo	20.50
Do	USY&TCo. and DG for NYC	16.75
Do	USY&TCo. and DG for PCC&StL&Penn	15.25
Do	USY&TCo. and DG for WAB	97.50
Do	USY&TCo. and DG for GT	7.00
Do	USY&TCo. and DG for CI&L	25.00
Do	USY&TCo. and DG for NYC&StL	2.00
Do	USY&TCo. and DG for Penn	3.50
Do	USY&TCo. and DG for CRI&P	432.00
Do	USY&TCo. and DG for CB&Q	545.50
Do	USY&TCo. and DG for CM&StP	548.50
Do	USY&TCo. and DG for IC	110.25
Do	USY&TCo. and AT&SF	6.50
Do	USY&TCo. and CB&Q	84.50
Do	USY&TCo. and CRI&P	34.00
Do	USY&TCo. and IC	1.50
Do	USY&TCo. and CM&StP	58.25
Do	USY&TCo. and DG for C&NW	526.50
Do	USY&TCo. and C&NW	81.75
P. T. Dolan, trading as Miller & Dolan	USY&TCo. and DG for B&O	1.25
Do	USY&TCo. and CGW	10.25
Do	USY&TCo. and DG for C&A	4.75
Do	USY&TCo. and PM	2.75
Do	USY&TCo. and DG for PM	2.50
Do	USY&TCo. and DG for CGW	34.50
Do	USY&TCo. and NYC	1.25
Do	USY&TCo. and CI&L	.50
Do	USY&TCo. and DG for AT&SF	3.00
Do	USY&TCo. and GT	.50
Do	USY&TCo. and Penn	.75
Do	USY&TCo. and Soo	.50
Do	USY&TCo. and C&EI	.25

	Complainants	Defendants	Amount
	Do	USY&TCo. and DG for C&EI	3.75
	Do	USY&TCo. and DG for MC	.25
	Do	USY&TCo. and DG for Soo	66.50
	Do	USY&TCo. and DG for NYC	3.75
	Do	USY&TCo. and DG for PCC&StL&Penn	1.75
	Do	USY&TCo. and DG for WAB	34.50
	Do	USY&TCo. and DG for GT	1.50
	Do	USY&TCo. and DG for CI&L	3.50
374	Do	USY&TCo. and DG for Penn	$ 2.25
	Do	USY&TCo. and DG for CRI&P	167.00
	Do	USY&TCo. and DG for CB&Q	348.00
	Do	USY&TCo. and DG for CM&StP	239.00
	Do	USY&TCo. and DG for IC	33.50
	Do	USY&TCo. and AT&SF	3.50
	Do	USY&TCo. and CB&Q	36.50
	Do	USY&TCo. and CRI&P	24.00
	Do	USY&TCo. and IC	5.75
	Do	USY&TCo. and CM&StP	45.25
	Do	USY&TCo. and DG for C&NW	445.50
	Do	USY&TCo. and C&NW	86.25
	Frank R. Mullen, trading as Mullen Commission Company	USY&TCo. and DG for B&O	.75
	Do	USY&TCo. and CGW	11.00
	Do	USY&TCo. and DG for C&A	1.75
	Do	USY&TCo. and DG for Erie	.50
	Do	USY&TCo. and PM	.25
	Do	USY&TCo. and Erie	.25
	Do	USY&TCo. and DG for PM	1.25
	Do	USY&TCo. and DG for CGW	84.25
	Do	USY&TCo. and NYC	.50
	Do	USY&TCo. and DG for AT&SF	18.50
	Do	USY&TCo. and GT	1.25
	Do	USY&TCo. and Penn	.50
	Do	USY&TCo. and C&EI	.75
	Do	USY&TCo. and DG for C&EI	9.50
	Do	USY&TCo. and DG for Soo	11.00
	Do	USY&TCo. and DG for NYC	3.00
	Do	USY&TCo. and DG for PCC&StL&Penn	1.50
	Do	USY&TCo. and DG for Wab	4.50
	Do	USY&TCo. and DG for GT	18.50
	Do	USY&TCo. and DG for CI&L	1.25
	Do	USY&TCo. and DG for NYC&StL	.50
	Do	USY&TCo. and DG for Penn	4.00
	Do	USY&TCo. and DG for CRI&P	165.50
	Do	USY&TCo. and DG for CB&Q	90.50
	Do	USY&TCo. and DG for CM&StP	357.25
	Do	USY&TCo. and DG for IC	23.25
	Do	USY&TCo. and DG for C&NW	151.50
	Do	USY&TCo. and C&NW	22.50
	Do	USY&TCo. and AT&SF	1.00
	Do	USY&TCo. and CB&Q	13.25
	Do	USY&TCo. and CRI&P	24.75
	Do	USY&TCo. and IC	.50
	Do	USY&TCo. and CM&StP	43.25
375	Robert S. Murray, trading as Murray & McDowell	USY&TCo. and DG for B&O	$ .75
	Do	USY&TCo. and CGW	6.75

	Complainants	Defendants	Amount
	Do	USY&TCo. and C&A	3.00
	Do	USY&TCo. and DG for C&A	60.50
	Do	USY&TCo. and DG for Erie	.50
	Do	USY&TCo. and PM	9.00
	Do	USY&TCo. and Wab	.25
	Do	USY&TCo. and DG for PM	61.75
	Do	USY&TCo. and DG for CGW	72.50
	Do	USY&TCo. and NYC	.50
	Do	USY&TCo. and CI&L	1.25
	Do	USY&TCo. and DG for AT&SF	30.75
	Do	USY&TCo. and GT	5.50
	Do	USY&TCo. and Soo	7.00
	Do	USY&TCo. and MC	5.50
	Do	USY&TCo. and C&EI	5.75
	Do	USY&TCo. and DG for C&EI	30.25
	Do	USY&TCo. and DG for MC	76.00
	Do	USY&TCo. and DG for Soo	58.25
	Do	USY&TCo. and DG for NYC	8.00
	Do	USY&TCo. and DG for PCC&StL and Penn	.25
	Do	USY&TCo. and DG for Wab	42.50
	Do	USY&TCo. and DG for C&NW	467.25
	Do	USY&TCo. and C&NW	97.75
	Do	USY&TCo. and DG for GT	20.50
	Do	USY&TCo. and DG for CI&L	9.50
	Do	USY&TCo. and DG for Penn	1.50
	Do	USY&TCo. and DG for CRI&P	223.50
	Do	USY&TCo. and DG for CB&Q	86.00
	Do	USY&TCo. and DG for CM&StP	566.00
	Do	USY&TCo. and DG for IC	242.00
	Do	USY&TCo. and AT&SF	2.75
	Do	USY&TCo. and CB&Q	13.00
	Do	USY&TCo. and CRI&P	40.25
	Do	USY&TCo. and IC	15.50
	Do	USY&TCo. and CM&StP	90.50
	B. F. Hubbird, trading as Minteer, Hubbird & Company	USY&TCo. and DG for B&O	14.00
	Do	USY&TCo. and CGW	.75
	Do	USY&TCo. and DG for C&A	2.00
	Do	USY&TCo. and DG for Erie	42.75
	Do	USY&TCo. and Erie	3.75
	Do	USY&TCo. and DG for PM	1.50
	Do	USY&TCo. and DG for CGW	37.50
	Do	USY&TCo. and NYC	.25
	Do	USY&TCo. and DG for AT&SF	11.75
	Do	USY&TCo. and DG for C&EI	1.00
	Do	USY&TCo. and DG for Soo	4.75
	Do	USY&TCo. and DG for NYC	4.50
	Do	USY&TCo. and DG for PCC&StL and Penn	1.50
	Do	USY&TCo. and DG for Wab	1.00
	Do	USY&TCo. and DG for GT	.75
	Do	USY&TCo. and DG for CI&L	8.25
	Do	USY&TCo. and DG for NYC&StL	1.25
	Do	USY&TCo. and DG for Penn	3.00
	Do	USY&TCo. and DG for CRI&P	189.75
376	Do	USY&TCo. and DG for CB&Q	$ 375.75
	Do	USY&TCo. and DG for CM&StP	466.25
	Do	USY&TCo. and DG for IC	32.75
	Do	USY&TCo. and CB&Q	103.25

Complainants	Defendants	Amount
Do	USY&TCo. and CRI&P	30.00
Do	USY&TCo. and IC	6.50
Do	USY&TCo. and CM&StP	66.00
Do	USY&TCo. and C&NW	24.75
Do	USY&TCo. and DG for C&NW	197.00
National Livestock Commission Company	USY&TCo. and DG for B&O	17.75
Do	USY&TCo. and CGW	43.50
Do	USY&TCo. and C&A	21.75
Do	USY&TCo. and DG for C&A	480.25
Do	USY&TCo. and DG for Erie	107.75
Do	USY&TCo. and PM	11.25
Do	USY&TCo. and Erie	7.50
Do	USY&TCo. and Wab	16.50
Do	USY&TCo. and DG for PM	36.00
Do	USY&TCo. and DG for CGW	236.75
Do	USY&TCo. and NYC	26.50
Do	USY&TCo. and CIL	13.25
Do	USY&TCo. and DG for AT&SF	542.75
Do	USY&TCo., PCC&StL and Penn	5.50
Do	USY&TCo. and NYC&StL	8.50
Do	USY&TCo. and GT	16.25
Do	USY&TCo. and Penn	23.75
Do	USY&TCo. and Soo	29.00
Do	USY&TCo. and MC	34.00
Do	USY&TCo. and C&EI	20.25
Do	USY&TCo. and DG for C&EI	232.75
Do	USY&TCo. and DG for MC	107.25
Do	USY&TCo. and DG for Soo	160.00
Do	USY&TCo. and DG for NYC	116.25
Do	USY&TCo. and DG for PCC&StL and Penn	78.25
Do	USY&TCo. and DG for Wab	367.25
Do	USY&TCo. and DG for GT	94.50
Do	USY&TCo. and DG for CI&L	105.50
Do	USY&TCo. and DG for NYC&StL	84.75
Do	USY&TCo. and DG for Penn	90.75
Do	USY&TCo. and DG for CRI&P	1,402.50
Do	USY&TCo. and DG for CB&Q	1,388.50
Do	USY&TCo. and DG for CM&StP	1,109.25
Do	USY&TCo. and DG for IC	738.75
Do	USY&TCo. and AT&SF	48.50
Do	USY&TCo. and CB&Q	341.75
Do	USY&TCo. and CRI&P	251.00
Do	USY&TCo. and IC	57.75
Do	USY&TCo. and CM&StP	213.00
Do	USY&TCo. and DG for C&NW	1,623.00
Do	USY&TCo. and C&NW	328.00
Northwestern Livestock Commission Company	USY&TCo. and DG for B&O	.75
Do	USY&TCo. and CGW	2.50
Do	USY&TCo. and C&A	.25
Do	USY&TCo. and DG for C&A	30.75
377 Do	USY&TCo. and DG for Erie	$ .75
Do	USY&TCo. and DG forCGW	28.25
Do	USY&TCo. and NYC	1.00
Do	USY&TCo. and DG forAT&SF	32.00
Do	USY&TCo. and Soo	16.75
Do	USY&TCo. and DG for C&EI	10.25
Do	USY&TCo. and DG for Soo	62.00

	Complainants	Defendants	Amount
	Do	USY&TCo. and DG for NYC	6.50
	Do	USY&TCo. and DG for PCC&StL and Penn	.25
	Do	USY&TCo. and DG for Wab	34.50
	Do	USY&TCo. and DG for GT	.25
	Do	USY&TCo. and DG for NYC&StL	.25
	Do	USY&TCo. and DG for Penn	.50
	Do	USY&TCo. and DG for CRI&P	45.25
	Do	USY&TCo. and DG for CB&Q	103.00
	Do	USY&TCo. and DG for CM&StP	478.50
	Do	USY&TCo. and DG for IC	129.00
	Do	USY&TCo. and AT&SF	.75
	Do	USY&TCo. and CB&Q	30.50
	Do	USY&TCo. and CRI&P	8.25
	Do	USY&TCo. and IC	10.50
	Do	USY&TCo. and DG for CM&StP	65.00
	Do	USY&TCo. and DG for C&NW	507.00
	Do	USY&TCo. and C&NW	133.50
	G. W. Nixon, C. S. Horn and W. H. Chisholm, co-partners trading as Nixon, Horn & Chisholm	USY&TCo. and DG for B&O	.50
	Do	USY&TCo. and CGW	4.00
	Do	USY&TCo. and DG for C&A	13.00
	Do	USY&TCo. and DG for Erie	4.50
	Do	USY&TCo. and Erie	2.25
	Do	USY&TCo. and Wab	.50
	Do	USY&TCo. and DG for CGW	110.75
	Do	USY&TCo. and NYC	1.25
	Do	USY&TCo. and DG for AT&SF	81.50
	Do	USY&TCo. and GT	.25
	Do	USY&TCo. and Penn	.75
	Do	USY&TCo. and Soo	6.75
	Do	USY&TCo. and MC	.75
	Do	USY&TCo. and C&EI	.75
	Do	USY&TCo. and DG for C&EI	33.25
	Do	USY&TCo. and DG for MC	2.25
	Do	USY&TCo. and DG for Soo	70.25
	Do	USY&TCo. and DG for NYC	7.75
	Do	USY&TCo. and DG for PCC&StL and Penn	1.00
	Do	USY&TCo. and DG for Wab	28.75
	Do	USY&TCo. and DG for GT	2.00
	Do	USY&TCo. and DG for CI&L	4.50
	Do	USY&TCo. and DG for NYC&StL	.50
	Do	USY&TCo. and DG for Penn	2.00
	Do	USY&TCo. and DG for CRI&P	63.75
	Do	USY&TCo. and DG for CB&Q	381.75
	Do	USY&TCo. and DG for CM&StP	418.00
	Do	USY&TCo. and DG for IC	182.75
	Do	USY&TCo. and AT&SF	4.75
378	Do	USY&TCo. and CB&Q	$ 59.00
	Do	USY&TCo. and CRI&P	9.75
	Do	USY&TCo. and IC	6.00
	Do	USY&TCo. and CM&StP	56.25
	Do	USY&TCo. and DG for C&NW	301.00
	Do	USY&TCo. and C&NW	59.25
	North American Live-stock Commission Company	USY&TCo. and CGW	7.00
	Do	USY&TCo. and DG for C&A	.50

	Complainants	Defendants	Amount
	Do	USY&TCo. and DG for CGW	21.75
	Do	USY&TCo. and NYC	.25
	Do	USY&TCo. and DG for C&EI	3.75
	Do	USY&TCo. and DG for NYC	1.50
	Do	USY&TCo. and DG for PCC&StL and Penn	.25
	Do	USY&TCo. and DG for Wab	5.75
	Do	USY&TCo. and DG for GT	.25
	Do	USY&TCo. and DG for CI&L	3.75
	Do	USY&TCo. and DG for CRI&P	172.50
	Do	USY&TCo. and DG for CB&Q	28.25
	Do	USY&TCo. and DG for CM&StP	115.25
	Do	USY&TCo. and DG for IC	21.75
	Do	USY&TCo. and CB&Q	3.75
	Do	USY&TCo. and CRI&P	25.25
	Do	USY&TCo. and CM&StP	14.25
	Do	USY&TCo. and DG for C&NW	153.00
	Do	USY&TCo. and C&NW	23.50
	Silas Palmer and W. H. Palmer, copartners trading as Silas Palmer & Son	USY&TCo. and DG for B&O	.50
	Do	USY&TCo. and CGW	11.00
	Do	USY&TCo. and DG for C&A	12.50
	Do	USY&TCo. and DG for Erie	10.00
	Do	USY&TCo. and PM	1.00
	Do	USY&TCo. and DG for PM	8.75
	Do	USY&TCo. and DG for CGW	178.25
	Do	USY&TCo. and NYC	11.25
	Do	USY&TCo. and CI&L	5.75
	Do	USY&TCo. and DG for AT&SF	20.50
	Do	USY&TCo., PCC&StL and Penn	1.50
	Do	USY&TCo. and NYC&StL	.25
	Do	USY&TCo. and GT	1.00
	Do	USY&TCo. and Penn	2.75
	Do	USY&TCo. and Soo	4.00
	Do	USY&TCo. and C&EI	.75
	Do	USY&TCo. and DG for C&EI	11.75
	Do	USY&TCo. and DG for MC	2.00
	Do	USY&TCo. and DG for Soo	41.50
	Do	USY&TCo. and DG for NYC	35.00
	Do	USY&TCo. and DG for PCC&StL and Penn	26.00
	Do	USY&TCo. and DG for Wab	3.00
	Do	USY&TCo. and DG for C&NW	485.50
	Do	USY&TCo. and C&NW	90.25
	Do	USY&TCo. and DG for GT	14.75
379	Do	USY&TCo. and DG for GI&L	$ 80.25
	Do	USY&TCo. and DG for NYC&StL	4.50
	Do	USY&TCo. and DG for Penn	4.75
	Do	USY&TCo. and DG for CRI&P	130.75
	Do	USY&TCo. and DG for CB&Q	189.00
	Do	USY&TCo. and DG for CM&StP	222.00
	Do	USY&TCo. and DG for IC	70.75
	Do	USY&TCo. and AT&SF	5.00
	Do	USY&TCo. and CB&Q	42.75
	Do	USY&TCo. and CRI&P	15.25
	Do	USY&TCo. and IC	6.00
	Do	USY&TCo. and CM&StP	67.50

Complainants	Defendants	Amount
T. B. Vincent and C. H. Boothroyd, copartners trading as Paris Commission Company	USY&TCo. and DG for B&O	.25
Do	USY&TCo. and CGW	3.75
Do	USY&TCo. and C&A	.25
Do	USY&TCo. and DG for C&A	6.00
Do	USY&TCo. and DG for CGW	83.50
Do	USY&TCo. and NYC	1.00
Do	USY&TCo. and DG for AT&SF	19.75
Do	USY&TCo. and Penn	.50
Do	USY&TCo. and Soo	6.00
Do	USY&TCo. and MC	.75
Do	USY&TCo. and DG for C&EI	.75
Do	USY&TCo. and DG for MC	9.75
Do	USY&TCo. and DG for Soo	2.75
Do	USY&TCo. and DG for NYC	8.25
Do	USY&TCo. and DG for PCC&StL and Penn	1.00
Do	USY&TCo. and DG for GT	.50
Do	USY&TCo. and DG for NYC&StL	.25
Do	USY&TCo. and DG for CRI&P	11.00
Do	USY&TCo. and DG for CB&Q	138.50
Do	USY&TCo. and DG for CM&StP	100.75
Do	USY&TCo. and DG for IC	16.25
Do	USY&TCo. and AT&SF	3.00
Do	USY&TCo. and CB&Q	25.75
Do	USY&TCo. and IC	.50
Do	USY&TCo. and CM&StP	19.75
Do	USY&TCo. and DG for C&NW	127.75
Do	USY&TCo. and C&NW	20.50
W. C. Patterson, trading as John Patterson & Son	USY&TCo. and DG for CGW	1.00
Do	USY&TCo. and DG for AT&SF	54.00
Do	USY&TCo. and DG for C&EI	9.25
Do	USY&TCo. and DG for NYC	.25
Do	USY&TCo. and DG for Penn	.25
Do	USY&TCo. and DG for CRI&P	12.50
Do	USY&TCo. and DG for CB&Q	88.25
Do	USY&TCo. and DG for CM&StP	1.75
Do	USY&TCo. and AT&SF	1.25
Do	USY&TCo. and CB&Q	3.25
Do	USY&TCo. and CRI&P	2.75
Do	USY&TCo. and IC	.50
Do	USY&TCo. and CM&StP	.50
Do	USY&TCo. and DG for C&NW	1.00
380 W. A. Peterson and Wm. Turnbull. copartners trading as Peterson, Turnbull & Company	USY&TCo. and DG for C&A	$ 26.25
Do	USY&TCo. and DG for Erie	.25
Do	USY&TCo. and DG for CGW	23.25
Do	USY&TCo. and DG for AT&SF	31.75
Do	USY&TCo. and Soo	.75
Do	USY&TCo. and DG for C&EI	14.75
Do	USY&TCo. and DG for Soo	.25
Do	USY&TCo. and DG for NYC	14.50

Complainants	Defendants	Amount
Do	USY&TCo. and DG for Wab	9.00
Do	USY&TCo. and DG for GT	.50
Do	USY&TCo. and DG for CI&L	1.25
Do	USY&TCo. and DG for NYC&StL	.50
Do	USY&TCo. and DG for CRI&P	61.25
Do	USY&TCo. and DG for CB&Q	57.75
Do	USY&TCo. and DG for CM&St.P	21.00
Do	USY&TCo. and DG for IC	49.00
Do	USY&TCo. and DG for C&NW	106.75
J. H. Piatt, trading as Abner Piatt & Company	USY&TCo. and C&A	.75
Do	USY&TCo. and DG for C&A	1.25
Do	USY&TCo. and DG for CGW	26.50
Do	USY&TCo. and DG for C&EI	1.50
Do	USY&TCo. and DG for Wab	6.25
Do	USY&TCo. and DG for GT	.75
Do	USY&TCo. and DG for CRI&P	20.75
Do	USY&TCo. and DG for CB&Q	3.75
Do	USY&TCo. and DG for CM&StP	134.50
Do	USY&TCo. and DG for IC	1.00
Do	USY&TCo. and CRI&P	9.00
Do	USY&TCo. and CM&StP	24.50
Do	USY&TCo. and DG for C&NW	60.75
Do	USY&TCo. and C&NW	18.50
Thos. K. Polley, trading as Thos. K. Polley & Company	USY&TCo. and DG for CM&StP	7.75
Do	USY&TCo. and CRI&P	12.25
Do	USY&TCo. and CM&StP	19.75
Do	USY&TCo. and DG for C&NW	5.50
Do	USY&TCo. and C&NW	7.50
381 R. H. Pritchard, trading as Pritchard Commission Company	USY&TCo. and CGW	$ 4.25
Do	USY&TCo. and C&A	1.00
Do	USY&TCo. and DG for C&A	4.25
Do	USY&TCo. and DG for CGW	52.50
Do	USY&TCo. and CI&L	.25
Do	USY&TCo. and DG for AT&SF	4.50
Do	USY&TCo. and Soo	1.25
Do	USY&TCo. and DG for C&EI	3.75
Do	USY&TCo. and DG for Soo	6.50
Do	USY&TCo. and DG for NYC	9.50
Do	USY&TCo. and DG for Wab	8.00
Do	USY&TCo. and DG for GT	.75
Do	USY&TCo. and DG for CI&L	.25
Do	USY&TCo. and DG for NYC&StL	.75
Do	USY&TCo. and DG for Penn	.75
Do	USY&TCo. and DG for CRI&P	218.25
Do	USY&TCo. and DG for CB&Q	33.75
Do	USY&TCo. and DG for CM&StP	107.75
Do	USY&TCo. and DG for IC	55.50
Do	USY&TCo. and AT&SF	.50
Do	USY&TCo. and CB&Q	1.75
Do	USY&TCo. and CRI&P	40.75
Do	USY&TCo. and IC	1.25

	Complainants	Defendants	Amount
	Do	USY&TCo. and CM&StP	7.75
	Do	USY&TCo. and DG for C&NW	140.75
	Do	USY&TCo. and C&NW	35.75
	Chas. R. Rice and Oscar A. Rice, copartners trading as Rice Bros.	USY&TCo. and DG for B&O	16.25
	Do	USY&TCo. and CGW	30.75
	Do	USY&TCo. and C&A	7.75
	Do	USY&TCo. and DG for C&A	108.75
	Do	USY&TCo. and DG for Erie	35.50
	Do	USY&TCo. and PM	2.25
	Do	USY&TCo. and Erie	3.25
	Do	USY&TCo. and Wab	5.75
	Do	USY&TCo. and DG for PM	11.00
	Do	USY&TCo. and DG for CGW	225.25
	Do	USY&TCo. and NYC	4.50
	Do	USY&TCo. and CI&L	.25
	Do	USY&TCo. and DG for AT&SF	173.50
	Do	USY&TCo. and PCCStL and Penn	2.00
	Do	USY&TCo. and NYC&StL	2.00
	Do	USY&TCo. and GT	1.00
	Do	USY&TCo. and Penn	3.50
	Do	USY&TCo. and Soo	15.25
	Do	USY&TCo. and MC	1.50
	Do	USY&TCo. and C&EI	6.50
	Do	USY&TCo. and DG for C&EI	134.25
	Do	USY&TCo. and DG for MC	17.25
	Do	USY&TCo. and DG for Soon	81.00
	Do	USY&TCO. and DG for NYC	64.00
	Do	USY&TCo. and DG for PCC&StL and Penn	47.00
382	Do	USY&TCo. and DG for Wab	$ 85.75
	Do	USY&TCo. and DG for GT	19.75
	Do	USY&TCo. and DG for CI&L	28.50
	Do	USY&TCo. and DG for NYC&St.L	34.50
	Do	USY&TCo. and DG for Penn	50.50
	Do	USY&TCo. and DG for CRI&P	651.50
	Do	USY&TCo. and DG for CB&Q	617.00
	Do	USY&TCo. and DG for CM&StP	1087.50
	Do	USY&TCo. and DG for IC	519.25
	Do	USY&TCo. and AT&SF	31.50
	Do	USY&TCo. and CB&Q	76.25
	Do	USY&TCo. and CRI&P	42.50
	Do	USY&TCo. and IC	54.25
	Do	USY&TCo. and CM&StP	175.00
	Do	USY&TCo. and DG for C&NW	1321.75
	Do	USY&TCo. and C&NW	230.75
	J. B. Roach and W. P. Roach, copartners trading as Roach Livestock Commission Company	USY&TCo. and CGW	10.75
	Do	USY&TCo. and DG for C&A	26.25
	Do	USY&TCo. and DG for PM	.25
	Do	USY&TCo. and DG for CGW	160.50
	Do	USY&TCo. and NYC	.25
	Do	USY&TCo. and CI&L	.25
	Do	USY&TCo. and DG for AT&SF	2.00
	Do	USY&TCo. and Soo	2.25
	Do	USY&TCo. and DG for C&EI	4.25

Complainants	Defendants	Amount
Do	USY&TCo. and DG for Soo	11.75
Do	USY&TCo. and DG for NYC	4.00
Do	USY&TCo. and DG for PCC&St L&Penn	.50
Do	USL&TCo. and DG for Wab	25.75
Do	USY&TCo. and DG for Penn	.50
Do	USY&TCo. and DG for CRI&P	169.00
Do	USY&TCo. and DG for CB&Q	188.25
Do	USY&TCo. and DG for CM&StP	395.75
Do	USY&TCo. and DG for IC	52.75
Do	USY&TCo. and CB&Q	30.75
Do	USY&TCo. and CRI&P	47.75
Do	USY&TCo. and IC	3.25
Do	USY&TCo. and CM&StP	87.75
Do	USY&TCo. and DG for C&NW	325.00
Do	USY&TCo. and C&NW	62.75
Rosenbaum & Company	USY&TCo. and DG for B&O	2.50
Do	USY&TCo. and CGW	9.25
Do	USY&TCo. and C&A	5.75
Do	USY&TCo. and DG for C&A	24.50
Do	USY&TCo. and DG for Erie	.25
Do	USY&TCo. and PM	.75
Do	USY&TCo. and Wab	1.75
Do	USY&TCo. and DG for CGW	104.75
Do	USY&TCo. and NYC	2.75
Do	USY&TCo. and DG for AT&SF	97.50
Do	USY&TCo. and GT	.50
Do	USY&TCo. and Soo	60.75
Do	USY&TCo. and C&EI.	41.25
383 Do	USY&TCo. and DG for C&EI	$ 13.50
Do	USY&TCo. and DG for MC	.75
Do	USY&TCo. and DG for Soo	106.50
Do	USY&TCo. and DG for NYC	17.25
Do	USY&TCo. and DG for PCC&StL&Penn	3.00
Do	USY&TCo. and DG for Wab	102.75
Do	USY&TCo. and DG for GT	9.50
Do	USY&TCo. and DG for CI&L	5.00
Do	USY&TCo. and DG for Penn	3.25
Do	USY&TCo. and DG for CRI&P	292.00
Do	USY&TCo. and DG for CB&Q	1161.00
Do	USY&TCo. and DG for CM&StP	841.25
Do	USY&TCo. and DG for IC	51.00
Do	USY&TCo. and DG for C&NW	778.75
Do	USY&TCo. and AT&SF	4.00
Do	USY&TCo. and CB&Q	438.50
Do	USY&TCo. and CRI&P	15.25
Do	USY&TCo. and IC	6.00
Do	USY&TCo. and CM&StP	274.25
Do	USY&TCo. and C&NW	194.75
F. W. Sheldon, trading as F. W. Sheldon & Company	USY&TCo. and CGW	20.00
Do	USY&TCo. and Erie	.25
Do	USY&TCo. and DG for CGW	65.00
Do	USY&TCo. and DG for C&EI	.50
Do	USY&TCo. and DG for GT	.25
Do	USY&TCo. and DG for CRI&P	57.50
Do	USY&TCo. and DG for CB&Q	40.50
Do	USY&TCo. and DG for CM&StP	16.00

	Complainants	Defendants	Amount
	Do	USY&TCo. and DG for IC	57.00
	Do	USY&TCo. and CB&Q	.25
	Do	USY&TCo. and CRI&P	2.50
	Do	USY&TCo. and IC	11.00
	Do	USY&TCo. and CM&StP	1.25
	Do	USY&TCo. and DG for C&NW	33.00
	Do	USY&TCo. and C&NW	2.25
	W. Harry Sherwood and Russell H. Sherwood, copartners, trading as Sherwood & Son	USY&TCo. and DG for C&A	4.75
	Do	USY&TCo. and DG for CGW	.25
	Do	USY&TCo. and Soo	5.75
	Do	USY&TCo. and DG for C&EI	18.50
	Do	USY&TCo. and DG for MC	2.50
	Do	USY&TCo. and DG for Soo	12.25
	Do	USY&TCo. and DG for NYC	.25
	Do	USY&TCo. and DG for Wab	8.00
	Do	USY&TCo. and DG for CRI&P	27.50
	Do	USY&TCo. and DG for CB&Q	51.00
	Do	USY&TCo. and DG for CM&StP	22.50
	Do	USY&TCo. and DG for IC	50.75
	Do	USY&TCo. and CB&Q	8.75
	Do	USY&TCo. and CRI&P	1.75
	Do	USY&TCo. and CM&StP	4.00
	Do	USY&TCo. and DG for C&NW	117.25
	Do	USY&TCo. and C&NW	6.75
384	J. Paul Shinn, Chas. H. Moberly and I. Q. Fry, copartners trading as Shinn, Fry & Moberly, successors to Shinn, Fry & Company	USY&TCo. and DG for B&O	1.75
	Do	USY&TCo. and CGW	.50
	Do	USY&TCo. and C&A	14.50
	Do	USY&TCo. and DG for C&A	232.50
	Do	USY&TCo. and Wab	2.00
	Do	USY&TCo. and DG for PM	.25
	Do	USY&TCo. and DG for CGW	5.25
	Do	USY&TCo. and DG for AT&SF	7.50
	Do	USY&TCo. and GT	1.00
	Do	USY&TCo. and Penn.	.25
	Do	USY&TCo. and DG for C&EI	14.50
	Do	USY&TCo. and DG for Soo	1.00
	Do	USY&TCo. and DG for NYC	6.75
	Do	USY&TCo. and DG for PCC&StL&Penn	6.00
	Do	USY&TCo. and DG for Wab	76.25
	Do	USY&TCo. and DG for GT	.25
	Do	USY&TCo. and DG for CI&L	1.50
	Do	USY&TCo. and DG for NYC&StL	.75
	Do	USY&TCo. and DG for Penn	1.25
	Do	USY&TCo. and DG for CRI&P	234.50
	Do	USY&TCo. and DG for CB&Q	87.25
	Do	USY&TCo. and DG for CM&StP	33.00
	Do	USY&TCo. and DG for IC	69.50
	Do	USY&TCo. and AT&SF	1.75
	Do	USY&TCo. and CB&Q	7.00
	Do	USY&TCo. and CRI&P	31.50

	Complainants	Defendants	Amount
	Do	USY&TCo. and IC	5.75
	Do	USY&TCo. and CM&StP	1.00
	Do	USY&TCo. and DG for C&NW	28.50
	Do	USY&TCo. and C&NW	9.25
	James G. Shutter	USY&TCo. and CGW	1.00
	Do	USY&TCo. and DG for CRI&P	3.50
	Do	USY&TCo. and DG for CB&Q	79.50
	Do	USY&TCo. and DG for CM&StP	16.25
	Do	USY&TCo. and DG for IC	25.25
	Do	USY&TCo. and CB&Q	4.50
	Do	USY&TCo. and IC	5.00
	Do	USY&TCo. and CM&StP	2.75
	Do	USY&TCo. and DG for C&NW	21.00
	Do	USY&TCo. and C&NW	5.25
	W. R. Smith, J. C. Eastes and John Smith, copartners trading as W. R. Smith & Company	USY&TCo. and DG for B&O	.25
	Do	USY&TCo. and CGW	3.75
	Do	USY&TCo. and DG for C&A	8.75
	Do	USY&TCo. and DG for Erie	.50
	Do	USY&TCo. and PM	.25
	Do	USY&TCo. and DG for PM	.25
	Do	USY&TCo. and DG for CGW	46.00
	Do	USY&TCo. and DG for AT&SF	2.00
	Do	USY&TCo. and GT	2.00
	Do	USY&TCo. and DG for C&EI	5.50
	Do	USY&TCo. and DG for Soo	12.50
	Do	USY&TCo. and DG for NYC	1.25
385	Do	USY&TCo. and DG for PCC&StL&Penn	$ .25
	Do	USY&TCo. and DG for Wab	10.25
	Do	USY&TCo. and DG for GT	8.00
	Do	USY&TCo. and DG for CI&L	4.25
	Do	USY&TCo. and DG for Penn	.50
	Do	USY&TCo. and DG for CRI&P	53.00
	Do	USY&TCo. and DG for CB&Q	201.00
	Do	USY&TCo. and DG for CM&StP	206.75
	Do	USY&TCo. and DG for IC	23.75
	Do	USY&TCo. and CB&Q	22.75
	Do	USY&TCo. and CRI&P	12.00
	Do	USY&TCo. and IC	2.25
	Do	USY&TCo. and CM&StP	49.00
	Do	USY&TCo. and DG for C&NW	400.50
	Do	USY&TCo. and C&NW	42.25
	T. B. Stafford and A. B. Stafford, copartners trading as Stafford Bros.	USY&TCo. and DG for B&O	.75
	Do	USY&TCo. and CGW	5.25
	Do	USY&TCo. and C&A	6.50
	Do	USY&TCo. and DG for C&A	308.50
	Do	USY&TCo. and DG for Erie	1.00
	Do	USY&TCo. and Wab	2.25
	Do	USY&TCo. and DG for PM	3.50
	Do	USY&TCo. and DG for CGW	53.50
	Do	USY&TCo. and NYC	.50
	Do	USY&TCo. and DG for AT&SF	139.75
	Do	USY&TCo. and Penn	1.00
	Do	USY&TCo. and Soo	1.25

	Complainants	Defendants	Amount
	Do	USY&TCo. and C&EI	.25
	Do	USY&TCo. and DG for C&EI	13.00
	Do	USY&TCo. and DG for Soo	11.75
	Do	USY&TCo. and DG for NYC	7.00
	Do	USY&TCo. and DG for PCC&StL&Penn	2.25
	Do	USY&TCo. and DG for Wab	71.75
	Do	USY&TCo. and DG for GT	3.25
	Do	USY&TCo. and DG for CI&L	11.50
	Do	USY&TCo. and DG for NYC&StL	1.25
	Do	USY&TCo. and DG for Penn	6.25
	Do	USY&TCo. and DG for CRI&P	418.25
	Do	USY&TCo. and DG for CB&Q	246.50
	Do	USY&TCo. and DG for CM&StP	447.25
	Do	USY&TCo. and DG for IC	175.75
	Do	USY&TCo. and AT&SF	12.00
	Do	USY&TCo. and CB&Q	45.50
	Do	USY&TCo. and CRI&P	59.25
	Do	USY&TCo. and IC	35.25
	Do	USY&TCo. and CM&StP	60.50
	Do	USY&TCo. and DG for C&NW	502.50
	Do	USY&TCo. and C&NW	158.00
386	Standard Livestock Commission Company	USY&TCo. and DG for B&O	$ 10.00
	Do	USY&TCo. and CGW	12.00
	Do	USY&TCo. and C&A	1.00
	Do	USY&TCo. and DG for C&A	8.60
	Do	USY&TCo. and DG for Erie	2.50
	Do	USY&TCo. and PM	11.75
	Do	USY&TCo. and Erie	.25
	Do	USY&TCo. and Wab	1.50
	Do	USY&TCo. and DG for PM	78.25
	Do	USY&TCo. and DG for CGW	53.25
	Do	USY&TCo. and NYC	2.75
	Do	USY&TCo. and CI&L	1.50
	Do	USY&TCo. and DG for AT&SF	15.75
	Do	USY&TCo. and PCC&StL and Penn	.50
	Do	USY&TCo. and NYC&StL	.25
	Do	USY&TCo. and GT	7.75
	Do	USY&TCo. and Penn	7.25
	Do	USY&TCo. and Soo	18.00
	Do	USY&TCo. and MC	4.25
	Do	USY&TCo. and C&EI	4.25
	Do	USY&TCo. and DG for C&EI	103.75
	Do	USY&TCo. and DG for MC	27.75
	Do	USY&TCo. and DG for Soo	87.75
	Do	USY&TCo. and DG for NYC	44.50
	Do	USY&TCo. and DG for PCC&StL and Penn	11.75
	Do	USY&TCo. and DG for Wab	19.00
	Do	USY&TCo. and DG for GT	34.25
	Do	USY&TCo. and DG for CI&L	57.00
	Do	USY&TCo. and DG for NYC&StL	6.00
	Do	USY&TCo. and DG for Penn	16.00
	Do	USY&TCo. and DG for CRI&P	116.75
	Do	USY&TCo. and DG for CB&Q	407.75
	Do	USY&TCo. and DG for CM&StP	499.00
	Do	USY&TCo. and DG for IC	95.25
	Do	USY&TCo. and AT&SF	.25
	Do	USY&TCo. and CB&Q	38.25

	Complainants	Defendants	Amount
	Do	USY&TCo. and CRI&P	11.75
	Do	USY&TCo. and IC	7.75
	Do	USY&TCo. and CM&StP	78.50
	Do	USY&TCo. and DG for C&NW	493.75
	Do	USY&TCo. and C&NW	123.50
	A. F. Starett, Jr., O. A. Mathison, A. C. Granger and M. E. Peschong, copartners trading as Starett, Mathison & Company	USY&TCo. and DG for B&O	.50
	Do	USY&TCo. and CGW	23.75
	Do	USY&TCo. and DG for C&A	6.25
	Do	USY&TCo. and DG for Erie	.75
	Do	USY&TCo. and Erie	.25
	Do	USY&TCo. and DG for PM	3.50
	Do	USY&TCo. and DG for CGW	150.50
	Do	USY&TCo. and NYC	.75
387	Do	USY&TCo. and CI&L	$ .75
	Do	USY&TCo. and DG for AT&SF	17.00
	Do	USY&TCo., PCC&StL and Penn	2.00
	Do	USY&TCo. and Soo	4.00
	Do	USY&TCo. and MC	.25
	Do	USY&TCo. and C&EI	2.25
	Do	USY&TCo. and DG for C&EI	49.50
	Do	USY&TCo. and DG for MC	1.50
	Do	USY&TCo. and DG for Soo	69.75
	Do	USY&TCo. and DG for NYC	32.50
	Do	USY&TCo. and DG for PCC&StL and Penn	2.50
	Do	USY&TCo. and DG for WAB	10.00
	Do	USY&TCo. and DG for GT	.25
	Do	USY&TCo. and DG for CI&L	10.75
	Do	USY&TCo. and DG for NYC&StL	1.00
	Do	USY&TCo. and DG for Penn	1.25
	Do	USY&TCo. and DG for CRI&P	113.75
	Do	USY&TCo. and DG for CB&Q	156.00
	Do	USY&TCo. and DG for CM&StP	490.50
	Do	USY&TCo. and DG for IC	142.75
	Do	USY&TCo. and AT&SF	.75
	Do	USY&TCo. and CB&Q	22.00
	Do	USY&TCo. and CRI&P	17.25
	Do	USY&TCo. and IC	24.00
	Do	USY&TCo. and CM&StP	80.75
	Do	USY&TCo. and DG for C&NW	247.75
	Do	USY&TCo. and C&NW	31.50
	Chas. E. Stephens and J. A. Goble, copartners trading as Stephens & Goble	USY&TCo. and DG for B&O	3.75
	Do	USY&TCo. and CGW	1.25
	Do	USY&TCo. and DG for C&A	30.25
	Do	USY&TCo. and DG for Erie	1.25
	Do	USY&TCo. and PM	.25
	Do	USY&TCo. and WAB	.25
	Do	USY&TCo. and DG for PM	1.25
	Do	USY&TCo. and DG for CGW	3.00
	Do	USY&TCo. and NYC	1.00
	Do	USY&TCo. and CI&L	4.75
	Do	USY&TCo. and DG for AT&SF	19.25

	Complainants	Defendants	Amount
	Do	USY&TCo. and GT	.25
	Do	USY&TCo. and Soo	29.75
	Do	USY&TCo. and C&EI	9.25
	Do	USY&TCo. and DG for C&EI	193.25
	Do	USY&TCo. and DG for MC	.75
	Do	USY&TCo. and DG for Soo	180.25
	Do	USY&TCo. and DG for NYC	34.50
	Do	USY&TCo. and DG for PCC&StL and Penn	18.50
	Do	USY&TCo. and DG for WAB	39.25
	Do	USY&TCo. and DG for GT	17.00
388	Do	USY&TCo. and DG for CI&L	$ 34.25
	Do	USY&TCo. and DG for NYC&StL	1.75
	Do	USY&TCo. and DG for Penn	2.75
	Do	USY&TCo. and DG for CRI&P	9.00
	Do	USY&TCo. and DG for CB&Q	76.50
	Do	USY&TCo. and DG for CM&StP	67.25
	Do	USY&TCo. and DG for IC	239.75
	Do	USY&TCo. and AT&SF	1.00
	Do	USY&TCo. and CB&Q	9.50
	Do	USY&TCo. and CRI&P	3.75
	Do	USY&TCo. and IC	51.75
	Do	USY&TCo. and CM&StP	15.25
	Do	USY&TCo. and DG for C&NW	115.00
	Do	USY&TCo. and C&NW	47.50
	A. F. Stewart trading as A. F. Stewart & Company	USY&TCo. and CGW	1.75
	Do	USY&TCo. and DG for CGW	9.00
	Do	USY&TCo. and DG for C&EI	.50
	Do	USY&TCo. and DG for Soo	1.50
	Do	USY&TCo. and DG for NYC	1.00
	Do	USY&TCo. and DG for GT	.25
	Do	USY&TCo. and DG for CI&L	.25
	Do	USY&TCo. and DG for NYC&StL	.50
	Do	USY&TCo. and DG for Penn	.25
	Do	USY&TCo. and DG for CRI&P	45.75
	Do	USY&TCo. and DG for CB&Q	21.00
	Do	USY&TCo. and DG for CM&StP	18.00
	Do	USY&TCo. and DG for IC	1.75
	Do	USY&TCo. and CB&Q	.25
	Do	USY&TCo. and CRI&P	2.75
	Do	USY&TCo. and IC	.50
	Do	USY&TCo. and CM&StP	5.25
	Do	USY&TCo. and DG for C&NW	124.00
	Do	USY&TCo. and C&NW	19.00
	J. E. Strader and J. L. Strader, copartners trading as Strader Bros.	USY&TCo. and DG for B&O	.25
	Do	USY&TCo. and DG for C&A	25.75
	Do	USY&TCo. and DG for Erie	.25
	Do	USY&TCo. and Erie	.25
	Do	USY&TCo. and DG for CGW	1.75
	Do	USY&TCo. and DG for AT&SF	48.00
	Do	USY&TCo. and DG for Soo	5.00
	Do	USY&TCo. and DG for NYC	5.75
	Do	USY&TCo. and DG for Wab	6.00
	Do	USY&TCo. and DG for NYC&StL	.25
	Do	USY&TCo. and DG for Penn	.25
	Do	USY&TCo. and DG for CRI&P	19.00

	Complainants	Defendants	Amount
	Do	USY&TCo. and DG for CB&Q	61.75
	Do	USY&TCo. and DG for CM&StP	2.50
	Do	USY&TCo. and AT&SF	.25
389	Do	USY&TCo. and CB&Q	$ 6.25
	Do	USY&TCo. and CRI&P	.50
	Do	USY&TCo. and CM&StP	.75
	Do	USY&TCo. and DG for C&NW	18.00
	Do	USY&TCo. and C&NW	3.00
	J. J. Sullivan and J. C. Sullivan, copartners trading as Sullivan Commission Company		
	Do	USY&TCo. and DG for B&O	.25
	Do	USY&TCo. and DG for C&A	3.50
	Do	USY&TCo. and DG for Erie	1.75
	Do	USY&TCo. and PM	5.25
	Do	USY&TCo. and Erie	.25
	Do	USY&TCo. and Wab.	7.25
	Do	USY&TCo. and DG for PM	16.25
	Do	USY&TCo. and DG for CGW	2.50
	Do	USY&TCo. and NYC	4.25
	Do	USY&TCo. and PCC&StL and Penn	1.25
	Do	USY&TCo. and NYC&StL	1.00
	Do	USY&TCo. and GT	2.75
	Do	USY&TCo. and Penn	5.00
	Do	USY&TCo. and DG for C&EI	.25
	Do	USY&TCo. and DG for Soo	.75
	Do	USY&TCo. and DG for NYC	42.00
	Do	USY&TCo. and DG for PCC&StL & Penn	8.00
	Do	USY&TCo. and DG for Wab	41.25
	Do	USY&TCo. and DG for GT	20.50
	Do	USY&TCo. and DG for CI&L	1.25
	Do	USY&TCo. and DG for NYC&StL	6.00
	Do	USY&TCo. and DG for Penn	17.25
	Do	USY&TCo. and DG for CRI&P	15.50
	Do	USY&TCo. and DG for CB&Q	5.50
	Do	USY&TCo. and DG for CM&StP	19.75
	Do	USY&TCo. and DG for IC	17.50
	Do	USY&TCo. and CRI&P	6.00
	Do	USY&TCo. and IC	6.00
	Do	USY&TCo. and CM&StP	9.75
	Do	USY&TCo. and DG for C&NW	98.00
	Do	USY&TCo. and C&NW	28.25
	A. Gilmore, C. L. Swanson and C. J. Catenhold, Copartners trading as Swanson, Gilmore & Gastenhold		
	Do	USY&TCo. and DG for B&O	18.75
	Do	USY&TCo. and CGW	7.75
	Do	USY&TCo. and DG for C&A	41.25
	Do	USY&TCo. and DG for Erie	13.25
	Do	USY&TCo. and PM	2.25
	Do	USY&TCo. and Erie	2.25
	Do	USY&TCo. and Wab	.75
	Do	USY&TCo. and DG for PM	18.50
	Do	USY&TCo. and DG for CGW	46.00
	Do	USY&TCo. and NYC	4.25
	Do	USY&TCo. and CI&L	.25
390	Do	USY&TCo. and DG for AT&SF	$ 16.75
	Do	USY&TCo. and Soo	15.75

	Complainants	Defendants	Amount
	Do	USY&TCo. and MC	.25
	Do	USY&TCo. and C&EI	3.25
	Do	USY&TCo. and DG for C&EI	85.50
	Do	USY&TCo. and DG for MC	1.75
	Do	USY&TCo. and DG for Soo	98.25
	Do	USY&TCo. and DG for NYC	104.50
	Do	USY&TCo. and DG for PCC&StL & Penn	6.00
	Do	USY&TCo. and DG for Wab	64.50
	Do	USY&TCo. and DG for GT	17.25
	Do	USY&TCo. and DG for CI&L	7.50
	Do	USY&TCo. and DG for NYC&StL	2.25
	Do	USY&TCo. and DG for Penn	3.75
	Do	USY&TCo. and DG for CRI&P	308.75
	Do	USY&TCo. and DG for CB&Q	364.75
	Do	USY&TCo. and DG for CM&StP	600.50
	Do	USY&TCo. and DG for IC	56.75
	Do	USY&TCo. and CB&Q	112.50
	Do	USY&TCo. and CRI&P	19.00
	Do	USY&TCo. and IC	2.00
	Do	USY&TCo. and CM&StP	69.75
	Do	USY&TCo. and DG for C&NW	650.00
	Do	USY&TCo. and C&NW	92.00
	Harry Thompson and C. N. Ball copartners trading as Thompson & Ball	USY&TCo. and DG for B&O	9.25
	Do	USY&TCo. and CGW	18.00
	Do	USY&TCo. and DG for C&A	8.00
	Do	USY&TCo. and PM	.25
	Do	USY&TCo. and DG for PM	1.50
	Do	USY&TCo. and DG for CGW	158.75
	Do	USY&TCo. and NYC	.25
	Do	USY&TCo. and DG for AT&SF	1.25
	Do	USY&TCo. and GT	1.75
	Do	USY&TCo. and Penn	5.75
	Do	USY&TCo. and MC	1.75
	Do	USY&TCo. and DG for C&EI	1.50
	Do	USY&TCo. and DG for MC	1.50
	Do	USY&TCo. and DG for NYC	7.75
	Do	USY&TCo. and DG for PCC&StL & Penn	8.25
	Do	USY&TCo. and DG for Wab	2.25
	Do	USY&TCo. and DG for GT	1.75
	Do	USY&TCo. and DG for CI&L	3.50
	Do	USY&TCo. and DG for NYC&StL	1.25
	Do	USY&TCo. and DG for Penn	29.50
	Do	USY&TCo. and DG for CRI&P	182.25
	Do	USY&TCo. and DG for CB&Q	52.25
	Do	USY&TCo. and DG for CM&StP	197.75
391	Do	USY&TCo. and DG for IC	$ 18.50
	Do	USY&TCo. and CB&Q	1.75
	Do	USY&TCo. and CRI&P	31.00
	Do	USY&TCo. and IC	6.50
	Do	USY&TCo. and CM&StP	29.00
	Do	USY&TCo. and C&NW	372.25
	Thos. Tipton, E. M. Steck and W. P. Herrick, copartners trading as Tipton, Steck & Herrick	USY&TCo. and DG for B&O	.25
	Do	USY&TCo. and DG for C&A	4.75

	Complainants	Defendants	Amount
	Do	USY&TCo. and DG for AT&SF	17.00
	Do	USY&TCo. and Soo	.75
	Do	USY&TCo. and DG for C&EI	11.50
	Do	USY&TCo. and DG for NYC	.25
	Do	USY&TCo. and DG for Wab	6.00
	Do	USY&TCo. and DG for GT	2.00
	Do	USY&TCo. and DG for CI&L	1.75
	Do	USY&TCo. and DG for Penn	.75
	Do	USY&TCo. and DG for CRI&P	4.00
	Do	USY&TCo. and DG for CB&Q	111.75
	Do	USY&TCo. and DG for CM&StP	8.25
	Do	USY&TCo. and DG for IC	11.25
	Do	USY&TCo. and AT&SF	.75
	Do	USY&TCo. and CB&Q	1.25
	Do	USY&TCo. and CRI&P	1.50
	Do	USY&TCo. and CM&StP	.50
	Do	USY&TCo. and DG for C&NW	15.25
	Do	USY&TCo. and C&NW	2.00
	D. L. Trout and F. L. Trout, copartners trading as Trout Livestock Commission Company	USY&TCo. and DG for B&O	1.00
	Do	USY&TCo. and CGW	.75
	Do	USY&TCo. and C&A	.75
	Do	USY&TCo. and DG for C&A	5.75
	Do	USY&TCo. and DG for Erie	23.50
	Do	USY&TCo. and PM	4.00
	Do	USY&TCo. and DG for PM	11.75
	Do	USY&TCo. and DG for CGW	29.50
	Do	USY&TCo. and NYC	7.50
	Do	USY&TCo. and CI&L	8.25
	Do	USY&TCo. and DG for AT&SF	.50
	Do	USY&TCo. and NYC&StL	.50
	Do	USY&TCo. and GT	1.00
	Do	USY&TCo. and Penn	1.75
	Do	USY&TCo. and C&EI	9.00
	Do	USY&TCo. and DG for C&EI	96.00
	Do	USY&TCo. and DG for MC	.25
	Do	USY&TCo. and DG for Soo	.50
392	Do	USY&TCo. and DG for NYC	$ 124.50
	Do	USY&TCo. and DG for PCC&StL & Penn	45.25
	Do	USY&TCo. and DG for Wab	11.50
	Do	USY&TCo. and DG for C&NW	57.50
	Do	USY&TCo. and C&NW	7.00
	Do	USY&TCo. and DG for GT	9.50
	Do	USY&TCo. and DG for CI&L	196.50
	Do	USY&TCo. and DG for NYC&StL	9.00
	Do	USY&TCo. and DG for Penn	11.50
	Do	USY&TCo. and DG for CRI&P	62.25
	Do	USY&TCo. and DG for CB&Q	34.25
	Do	USY&TCo. and DG for CM&StP	82.00
	Do	USY&TCo. and DG for IC	40.00
	Do	USY&TCo. and CB&Q	6.25
	Do	USY&TCo. and CRI&P	1.00
	Do	USY&TCo. and IC	1.25
	Do	USY&TCo. and CM&StP	8.25
	C. B. Van Norman & Co.	USY&TCo. and DG for B&O	1.75
	Do	USY&TCo. and CGW	6.50
	Do	USY&TCo. and C&A	1.50

	Complainants	Defendants	Amount
	Do	USY&TCo. and DG for C&A	11.50
	Do	USY&TCo. and DG for Erie	3.75
	Do	USY&TCo. and Erie	1.50
	Do	USY&TCo. and DG for CGW	55.25
	Do	USY&TCo. and NYC	.25
	Do	USY&TCo. and DG for AT&SF	14.25
	Do	USY&TCo. and NYC&StL	1.25
	Do	USY&TCo. and Soo	17.00
	Do	USY&TCo. and DG for C&EI	6.00
	Do	USY&TCo. and DG for Soo	13.50
	Do	USY&TCo. and DG for NYC	.50
	Do	USY&TCo. and DG for PCC&StL & Penn	17.00
	Do	USY&TCo. and DG for Wab	1.25
	Do	USY&TCo. and DG for GT	2.25
	Do	USY&TCo. and DG for CI&L	5.00
	Do	USY&TCo. and DG for NYC&StL	12.25
	Do	USY&TCo. and DG for Penn	2.75
	Do	USY&TCo. and DG for CRI&P	31.00
	Do	USY&TCo. and DG for CB&Q	103.00
	Do	USY&TCo. and DG for CM&StP	256.50
	Do	USY&TCo. and DG for IC	118.25
	Do	USY&TCo. and CB&Q	23.75
	Do	USY&TCo. and CRI&P	1.25
	Do	USY&TCo. and IC	18.25
	Do	USY&TCo. and DG for C&NW	191.25
	Van Norman Lawler & Co.	USY&TCo. and DG for B&O	6.50
	Do	USY&TCo. and CGW	28.50
	Do	USY&TCo. and DG for C&A	16.00
	Do	USY&TCo. and DG for Erie	38.50
	Do	USY&TCo. and PM	6.00
	Do	USY&TCo. and Erie	1.50
393	Do	USY&TCo. and DG for PM	$ 83.75
	Do	USY&TCo. and DG for CGW	180.00
	Do	USY&TCo. and NYC	3.75
	Do	USY&TCo. and CI&L	4.25
	Do	USY&TCo. and DG for AT&SF	53.00
	Do	USY&TCo. and PCC&StL & Penn	.50
	Do	USY&TCo. and NYC&StL	1.00
	Do	USY&TCo. and GT	4.00
	Do	USY&TCo. and Penn	2.50
	Do	USY&TCo. and Soo	88.75
	Do	USY&TCo. and MC	3.50
	Do	USY&TCo. and C&EI	.25
	Do	USY&TCo. and DG for C&EI	39.25
	Do	USY&TCo. and DG for MC	9.00
	Do	USY&TCo. and DG for Soo	473.25
	Do	USY&TCo. and DG for NYC	30.25
	Do	USY&TCo. and DG for PCC&StL & Penn	14.00
	Do	USY&TCo. and DG for Wab	35.75
	Do	USY&TCo. and DG for GT	70.75
	Do	USY&TCo. and DG for CI&L	138.25
	Do	USY&TCo. and DG for NYC&StL	18.25
	Do	USY&TCo. and DG for Penn	33.50
	Do	USY&TCo. and DG for CRI&P	143.00
	Do	USY&TCo. and DG for CB&Q	212.00
	Do	USY&TCo. and DG for CM&StP	1405.00
	Do	USY&TCo. and DG for IC	230.00
	Do	USY&TCo. and AT&SF	3.50
	Do	USY&TCo. and CB&Q	20.50

	Complainants	Defendants	Amount
	Do	USY&TCo. and CRI&P	11.25
	Do	USY&TCo. and IC	29.75
	Do	USY&TCo. and CM&StP	402.00
	Do	USY&TCo. and DG for C&NW	1192.50
	Do	USY&TCo. and C&NW	357.75
	W. H. Walter, trading as Walter Bros.	USY&TCo. and DG for B&O	.50
	Do	USY&TCo. and CGW	.50
	Do	USY&TCo. and DG for C&A	38.00
	Do	USY&TCo. and DG for Erie	.75
	Do	USY&TCo. and Wab	.25
	Do	USY&TCo. and DG for PM	1.75
	Do	USY&TCo. and DG for CGW	20.00
	Do	USY&TCo. and DG for AT&SF	27.50
	Do	USY&TCo. and NYC&StL	.50
	Do	USY&TCo. and Soo	11.25
	Do	USY&TCo. and MC	1.75
	Do	USY&TCo. and DG for C&EI	4.75
	Do	USY&TCo. and DG for MC	7.50
	Do	USY&TCo. and DG for Soo	1.50
	Do	USY&TCo. and DG for NYC	5.00
	Do	USY&TCo. and DG for PCC&StL and Penn	1.75
	Do	USY&TCo. and DG for Wab	23.75
	Do	USY&TCo. and DG for GT	1.50
	Do	USY&TCo. and DG for CI&L	2.00
	Do	USY&TCo. and DG for NYC&StL	2.75
	Do	USY&TCo. and DG for Penn	5.75
	Do	USY&TCo. and DG for CRI&P	46.25
	Do	USY&TCo. and DG for CB&Q	89.75
	Do	USY&TCo. and DG for CM&StP	127.50
	Do	USY&TCo. and DG for IC	37.00
	De	USY&TCo. and AT&SF	7.25
	Do	USY&TCo. and CB&Q	5.75
394	Do	USY&TCo. and CRI&P	$ 6.75
	Do	USY&TCo. and IC	1.25
	Do	USY&TCo. and CM&StP	26.50
	Do	USY&TCo. and DG for C&NW	126.00
	Do	USY&TCo. and C&NW	26.25
	A. A. Walters, C. A. Dunbar and J. H. Dunbar, co-partners trading as Walter & Dunbar	USY&TCo. and DG for B&O	7.75
	Do	USY&TCo. and CGW	9.00
	Do	USY&TCo. and C&A	1.75
	Do	USY&TCo. and DG for C&A	82.50
	Do	USY&TCo. and DG for Erie	27.25
	Do	USY&TCo. and PM	.50
	Do	USY&TCo. and DG for PM	3.75
	Do	USY&TCo. and DG for CGW	177.50
	Do	USY&TCo. and NYC	6.00
	Do	USY&TCo. and CI&L	1.25
	Do	USY&TCo. and DG for AT&SF	81.50
	Do	USY&TCo. and PCC&StL and Penn	.50
	Do	USY&TCo. and NYC&StL	.75
	Do	USY&TCo. and Penn	6.00
	Do	USY&TCo. and Soo	32.75
	Do	USY&TCo. and C&EI	7.00
	Do	USY&TCo. and DG for C&EI	64.25
	Do	USY&TCo. and DG for MC	7.00

Complainants	Defendants	Amount
Do	USY&TCo. and DG for Soo	127.25
Do	USY&TCo. and DG for NYC	63.00
Do	USY&TCo. and DG for PCC&StL and Penn	16.75
Do	USY&TCo. and DG for Wab	67.25
Do	USY&TCo. and DG for GT	11.00
Do	USY&TCo. and DG for CI&L	45.50
Do	USY&TCo. and DG for NYC&StL	14.25
Do	USY&TCo. and DG for Penn	26.75
Do	USY&TCo. and DG for CRI&P	322.25
Do	USY&TCo. and DG for CB&Q	756.00
Do	USY&TCo. and DG for CM&StP	731.00
Do	USY&TCo. and DG for IC	123.00
Do	USY&TCo. and AT&SF	8.00
Do	USY&TCo. and CB&Q	266.50
Do	USY&TCo. and CRI&P	37.00
Do	USY&TCo. and IC	9.50
Do	USY&TCo. and CM&StP	181.75
Do	USY&TCo. and DG for C&NW	860.50
Do	USY&TCo. and C&NW	155.00
L. B. Werden	USY&TCo. and C&A	.25
Do	USY&TCo. and DG for C&A	1.75
Do	USY&TCo. and Soo	1.25
Do	USY&TCo. and DG for Soo	13.75
Do	USY&TCo. and DG for Wab	.75
Do	USY&TCo. and DG for CRI&P	3.25
Do	USY&TCo. and DG for CB&Q	17.25
Do	USY&TCo. and DG for CM&StP	595.00
Do	USY&TCo. and DG for IC	7.50
Do	USY&TCo. and CB&Q	4.25
Do	USY&TCo. and CRI&P	.75
Do	USY&TCo. and CM&StP	12.25
Do	USY&TCo. and DG for C&NW	9.50
Do	USY&TCo. and C&NW	1.00
395 W. W. Wilson and Chas. A. Wilson, copartners trading as W. W. Wilson & Company	USY&TCo. and DG for B&O	$ .25
Do	USY&TCo. and CGW	22.25
Do	USY&TCo. and C&A	8.25
Do	USY&TCo. and DG for C&A	17.00
Do	USY&TCo. and DG for Erie	.25
Do	USY&TCo. and PM	.50
Do	USY&TCo. and DG for MP	.25
Do	USY&TCo. and DG for CGW	188.75
Do	USY&TCo. and NYC	2.25
Do	USY&TCo. and CI&L	.75
Do	USY&TCo. and DG for AT&SF	16.00
Do	USY&TCo. and PCC&StL and Penn	1.75
Do	USY&TCo. and NYC&StL	.75
Do	USY&TCo. and Penn	1.25
Do	USY&TCo. and Soo	17.00
Do	USY&TCo. and C&EI	2.25
Do	USY&TCo. and DG for C&EI	7.25
Do	USY&TCo. and DG for MC	.25
Do	USY&TCo. and DG for Soo	19.00
Do	USY&TCo. and DG for NYC	3.00
Do	USY&TCo. and DG for PCC&StL and Penn	3.00
Do	USY&TCo. and DG for Wab	30.00
Do	USY&TCo. and DG for GT	.25

Complainants	Defendants	Amount
Do	USY&TCo. and DG for CI&L	11.50
Do	USY&TCo. and DG for NYC&StL	1.00
Do	USY&TCo. and DG for Penn	3.25
Do	USY&TCo. and DG for CRI&P	366.25
Do	USY&TCo. and DG for CB&Q	126.50
Do	USY&TCo. and DG for IC	141.50
Do	USY&TCo. and AT&SF	7.50
Do	USY&TCo. and CB&Q	46.75
Do	USY&TCo. and CRI&P	57.00
Do	USY&TCo. and IC	12.00
Do	USY&TCo. and CM&StP	166.25
Do	USY&TCo. and DG for C&NW	575.25
Do	USY&TCo. and C&NW	89.75
Jet Wimp, trading as Jet Wimp & Company	USY&TCo. and DG for Erie	.75
Do	USY&TCo. and DG for AT&SF	70.50
Do	USY&TCo. and DG for Wab	6.75
Do	USY&TCo. and DG for CRI&P	2.00
Do	USY&TCo. and DG for CB&Q	205.50
Do	USY&TCo. and DG for CM&StP	12.00
Do	USY&TCo. and CB&Q	34.00
Do	USY&TCo. and CRI&P	.25
Do	USY&TCo. and DG for C&NW	17.75
Do	USY&TCo. and C&NW	1.50
Kay Wood and Chas. A. Wood, copartners trading as Wood Bros.	USY&TCo. and DG for B&O	6.50
Do	USY&TCo. and CGW	19.50
Do	USY&TCo. and C&A	.50
Do	USY&TCo. and DG for C&A	85.75
Do	USY&TCo. and DG for Erie	3.50
Do	USY&TCo. and PM	.25
Do	USY&TCo. and Erie	2.50
396 Do	USY&TCo. and Wab	$ 1.00
Do	USY&TCo. and DG for PM	3.00
Do	USY&TCo. and DG for CGW	199.75
Do	USY&TCo. and NYC	13.75
Do	USY&TCo. and CI&L	4.25
Do	USY&TCo. and DG for AT&SF	122.75
Do	USY&TCo. and GT	1.25
Do	USY&TCo. and Penn	.25
Do	USY&TCo. and Soo	56.00
Do	USY&TCo. and MC	2.75
Do	USY&TCo. and C&EI	3.25
Do	USY&TCo. and DG for C&EI	124.25
Do	USY&TCo. and DG for MC	9.25
Do	USY&TCo. and DG for Soo	142.00
Do	USY&TCo. and DG for NYC	31.25
Do	USY&TCo. and DG for PCC&StL and Penn.	24.75
Do	USY&TCo. and DG for Wab	84.75
Do	USY&TCo. and DG for GT	3.50
Do	USY&TCo. and DG for CI&L	83.25
Do	USY&TCo. and DG for NYC&StL	.50
Do	USY&TCo. and DG for Penn	4.50
Do	USY&TCo. and DG for CRI&P	560.50
Do	USY&TCo. and DG for CB&Q	534.25
Do	USY&TCo. and DG for CM&StP	1097.25
Do	USY&TCo. and DG for IC	339.00
Do	USY&TCo. and AT&SF	7.75

Complainants	Defendants	Amount
Do	USY&TCo. and CB&Q	207.50
Do	USY&TCo. and CRI&P	55.75
Do	USY&TCo. and IC	28.75
Do	USY&TCo. and CM&StP	184.00
Do	USY&TCo. and DG for C&NW	1074.50
Do	USY&TCo. and C&NW	244.50
Curtis A. Wood and Walter R. Wood, copartners trading as Curtis A. Wood & Company	USY&TCo. and CGW	.50
Do	USY&TCo. and DG for PM	.25
Do	USY&TCo. and DG for CGW	3.75
Do	USY&TCo. and DG for AT&SF	.25
Do	USY&TCo. and DG for C&EI	3.00
Do	USY&TCo. and DG for Soo	1.75
Do	USY&TCo. and DG for GT	2.00
Do	USY&TCo. and DG for NYC&StL	.50
Do	USY&TCo. and DG for Penn	.25
Do	USY&TCo. and DG for CRI&P	29.25
Do	USY&TCo. and DG for CB&Q	14.00
Do	USY&TCo. and DG for CM&StP	191.25
Do	USY&TCo. and DG for IC	65.25
Do	USY&TCo. and AT&SF	.75
Do	USY&TCo. and CB&Q	4.00
Do	USY&TCo. and CRI&P	3.00
Do	USY&TCo. and IC	.75
Do	USY&TCo. and CM&StP	19.50
Do	USY&TCo. and DG for C&NW	279.25
Do	USY&TCo. and C&NW	38.00
397 L. B. Yancey	USY&TCo. and CGW	$ .75
Do	USY&TCo. and DG for C&A	.75
Do	USY&TCo. and DG for Erie	.75
Do	USY&TCo. and DG for PM	.25
Do	USY&TCo. and DG for CGW	10.50
Do	USY&TCo. and DG for MC	.25
Do	USY&TCo. and DG for PCC&StL and Penn	1.00
Do	USY&TCo. and DG for GT	.25
Do	USY&TCo. and DG for NYC&StL	.75
Do	USY&TCo. and DG for Penn	6.50
Do	USY&TCo. and DG for CRI&P	54.25
Do	USY&TCo. and DG for CB&Q	14.00
Do	USY&TCo. and DG for CM&StP	151.50
Do	USY&TCo. and DG for IC	8.00
Do	USY&TCo. and CB&Q	.50
Do	USY&TCo. and CRI&P	6.75
Do	USY&TCo. and IC	1.25
Do	USY&TCo. and CM&StP	20.75
Do	USY&TCo. and DG for C&NW	70.25
Do	USY&TCo. and C&NW	15.75
W. E. Young, trading as W. E. Young & Company	USY&TCo. and DG for B&O	1.25
Do	USY&TCo. and CGW	1.50
Do	USY&TCo. and DG for C&A	1.25
Do	USY&TCo. and PM	.25
Do	USY&TCo. and DG for PM	1.75
Do	USY&TCo. and DG for CGW	11.00
Do	USY&TCo. and NYC	.75
Do	USY&TCo. and PCC&StL and Penn	.25
Do	USY&TCo. and Penn	.25

Complainants	Defendants	Amount
Do	USY&TCo. and Soo	.50
Do	USY&TCo. and MC	1.00
Do	USY&TCo. and DG for C&EI	2.00
Do	USY&TCo. and DG for MC	.25
Do	USY&TCo. and DG for Soo	.50
Do	USY&TCo. and DG for NYC	2.75
Do	USY&TCo. and DG for PCC&StL and Penn	3.75
Do	USY&TCo. and DG for Wab	25.25
Do	USY&TCo. and DG for CI&L	20.25
Do	USY&TCo. and DG for NYC&StL	.25
Do	USY&TCo. and DG for Penn	6.00
Do	USY&TCo. and DG for CRI&P	13.75
Do	USY&TCo. and DG for CB&Q	26.00
Do	USY&TCo. and DG for CM&StP	33.50
Do	USY&TCo. and DG for IC	1.75
Do	USY&TCo. and CB&Q	3.50
Do	USY&TCo. and CRI&P	2.25
Do	USY&TCo. and IC	1.00
Do	USY&TCo. and CM&StP	10.25
Do	USY&TCo. and DG for C&NW	47.50
Do	USY&TCo. and C&NW	9.25

398 It Is Therefore Ordered, That the defendants named in each of the groups shown in the above table be, and they are hereby, authorized and directed to pay unto the complainants shown opposite said groups, on or before January 26th, 1928, the amounts set opposite their respective names in said table, with interest thereon at the rate of six per cent per annum from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of the unlawful collection of separate charges, in addition to the line haul rates, for loading and unloading of interstate shipments of ordinary livestock, in carloads, at the Chicago stockyards.

By the commission.

GEORGE B. MCGINTY,
Secretary.

(Seal)

399 INDEX TO ABBREVIATIONS.

A. T. & S. F.—The Atchison, Topeka & Santa Fe Railway Co.
B. & O.—The Baltimore & Ohio R. R. Co.
C. & O.—The Chesapeake & Ohio Ry. Co. of Indiana.
C. & A.—The Chicago & Alton R. R. Co.
C. & E. I.—Chicago & Eastern Illinois R. R. Co., and W. J. Jackson, Receiver.
C. & N. W.—Chicago & North Western Ry. Co.
C. B. & Q.—Chicago, Burlington & Quincy R. R. Co.
C. G. W.—Chicago Great Western R. R. Co.

C. I. & L.—Chicago, Indianapolis & Louisville Ry. Co.
C. J. Ry.—Chicago Junction Ry. Co.
C. M. & St. P.—Chicago, Milwaukee & St. Paul Ry. Co.
C. R. I. & P.—The Chicago, Rock Island & Pacific Ry. Co.
C. T. H. & S. E.—Chicago, Terre Haute & Southeastern Ry. Co.
C. C. C. & St. L.—The Cleveland, Cincinnati, Chicago and St. Louis Ry. Co.
G. T.—Grand Trunk Ry. Co.
I. C.—Illinois Central R. R. Co.
I. H. B.—Indiana Harbor Belt R. R. Co.
M. C.—The Michigan Central R. R. Co.
Soo—Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.
N. Y. C.—The New York Central R. R. Co.
N. Y. C. & St. L.—The New York, Chicago & St. Louis R. R. Co.
Penn.—The Pennsylvania R. R. Co.
Penn. W. L.—The Pennsylvania R. R. Co. Western Lines.
P. M.—Pere Marquette Ry. Co.
P. C. C. & St. L.—The Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co.
T. St. L. & W.—Toledo, St. Louis & Western R. R. Co.
U. S. Y. & T. Co.—Union Stock Yard & Transit Co.
Wab.—Wabash Ry. Co.
D. G. for Andrew W. Mellon, Director General of Railroads, as Agent of the President under section 206 of the Transportation Act, 1920, defendant herein pursuant to said section in respect of the • • •

400 Mr. Towner: It will be stipulated between the parties that in connection with Plaintiffs' Exhibit 4 this suit is not brought to recover any amount except those amounts that are preceded by the designation "U. S. Y. and T. Co. and D. G." for some railroad.

It is also stipulated that on Exhibit 4 all amounts which are not preceded by the initials "D. G." are not involved in this case. Is that agreeable?

Mr. Godman: That is true.

Mr. Godman: I offer as Plaintiffs' Exhibit 5 the order of the Interstate Commerce Commission decided and rendered May 14, 1928, *Chicago Live Stock Exchange* v. *Atchison, Topeka and Santa Fe Railway Company*, reported in 144 I. C. C. 175.

Mr. Towner: No objection.

The Court: It may be admitted.

Whereupon said document, marked Plaintiffs' Exhibit 5, was received in evidence, and is in the words and figures following, to-wit:

Pls' Ex. 5. 401

PLAINTIFFS' EXHIBIT 5.

ADP

INTERSTATE COMMERCE COMMISSION.

No. 9977[1]

Chicago Live Stock Exchange v. *Atchison, Topeka & Santa Fe Railway Company et al.*

Decided May 14, 1928

Order awarding reparation on account of the unlawful collection of separate charges for the loading and unloading of livestock, in carloads, at the Chicago stockyards under former decisions, 58 I. C. C. 164 and 100 I. C. C. 266, modified. Appearances shown in former reports.

Supplemental Report of the Commission.

By the Commission:

On December 12, 1927, we issued an order directing defendants to pay specified amounts of reparation to certain of the parties listed in our previous report, on further hearing, 100 I. C. C. 266. In that report, supplementing our former report, we found that the collection of separate charges from complainants and interveners for the service of unloading and loading interstate shipments of ordinary livestock at the Chicago, Ill., stockyards, in addition to the line-haul rates on such livestock, between May 21, 1917, and April 1, 1920, and intrastate shipments during the period of Federal con-

[1] This report also embraces No. 12614, *Chicago Live Stock Exchange et al. v. Director General, as Agent, Atchison, Topeka & Santa Fe Railway Company, et al.*

trol, was an unlawful and unreasonable practice. We there said:

The foregoing complainants and interveners found entitled to reparation should severally prepare statements in accordance with Rule V of the Rules of Practice, separated as to participating defendant carriers, including as a defendant, the stockyard company and also including the Director General of Railroads, as agent, in appropriate cases in No. 12614. The statements should be submitted to the appropriate defendants for verification. If not so verified within a reasonable time, they should be filed here for check upon the record, with a view to the entry of an order awarding reparation.

The Director General of Railroads, as agent, and the Union Stock Yard & Transit Company having refused to verify the Rule V statements submitted to them, complainants filed with us statements, in some instances copies of original Rule V statements, containing the essential information called for by Rule V of the Rules of Practice except the dates on which the charges were paid. Many of these statements were verified by the defendant carriers. Subsequently complainants filed with us tabulated statements in which were embodied in convenient form, summaries, separated as to participating defendants, of the numbers of shipments received by, and amounts of reparation due to, each of the parties shown in the detailed statements previously filed. After these summaries had been checked upon the record, we issued the aforementioned order of December 12, 1927.

This order contained the following recital:

the parties having filed agreed statements with respect to the shipments in question, showing, among other things, the dates on which payment of the charge assailed was made * * *.

In respect of all shipments, "agreed" statements were not filed. Also, the statements which were filed do not show the "dates on which the payment of the charges assailed was made." They do show, however, the dates of unloading or loading at Chicago, and a competent witness testified that, following the practice which grew out of the tremendous volume of livestock received daily at Chicago, "the Union Stock Yard & Transit Company * * * submits to the commission merchant twice a week a statement of all of the charges due from that commission merchant, the commission firm paying to the Union Stock Yard & Transit Company said freight charges." A similar practice obtained in respect of loading

charges prepaid at Chicago. Thus the record shows with reasonable certainty, if not the exact dates upon which, at least the period within which, the charges assailed were paid. Under the circumstances we find that a fair method of determining interest periods would be to compute the interest from the grst of the month next succeeding the dates of unloading or loading of the livestock at Chicago.

The names of the three following parties, (1) G. B. Van Norman, individual trading as G. B. Van Norman & Company, (2) Miller, White & Wood, and (3) O. D. Freeland and C. M. Godfrey, copartners trading as Freeland & Godfrey, were incorrectly shown in our order of December 12, 1927. These errors will be corrected.

An order will be entered making the necessary modifications in our order of December 12, 1927.

402 ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 14th day of May, A. D. 1928.

No. 9977

The Chicago Live Stock Exchange

v.

The Atchison, Topeka & Santa Fe Railway Company *et al.*

No. 12614

Same

v.

Director General, as Agent, The Atchison, Topeka & Santa Fe Railway Company, *et al.*

It Appearing, That on February 11, 1919, the commission entered its report, on July 15, 1920, and Jul 2, 1925, its reports on further hearings, and on December 12, 1927, its order in the above-entitled proceedings, and the commission having further considered its order of December 12, 1927, and, on the date hereof, made and filed a report containing its findings of fact and conclusions in regard thereto, which said report and

the reports of February 11, 1919, July 15, 1920, and June 2, 1925, and order of December 12, 1927, are hereby referred to and made a part hereof:

It Is Ordered, That the first paragraph of said order of December 12, 1927, be, and it is hereby, modified to read as follows:

It Appearing, That on February 11, 1919, the commission entered its report, and on July 15, 1920, and June 2, 1925, its reports on further hearings in the above-entitled proceedings, which reports are hereby referred to and made a part hereof, and these proceedings now coming on for further consideration on the question of reparation, and complainants having filed statements with respect to the shipments in question; we find that complainants shown in the following table are entitled to awards of reparation from the defendants named below in the amounts set opposite their respective names, with interest:

It Is Further Ordered, That on sheet 20 of said order of December 12, 1927, "O. O. Freeland" be, and it is hereby, changed to "O. D. Freeland"; that on sheet 30 of said order "Muller, White & Woods" be, and it is hereby, changed to "Miller, White & Woods"; and that on sheet 49 of said order "C. B. Van Norman & Co." be, and it is hereby, changed to "G. B. Van Norman, individual trading as G. B. Van Norman & Company."

It Is Further Ordered, That the concluding paragraph of said order of December 12, 1927, be, and it is hereby, modified to read as follows:

It Is Therefore Ordered, That the defendants named in each of the groups shown in the above table be, and they are hereby, authorized and directed to pay unto the complainants shown opposite said groups, on or before August 10, 1928, the amounts set opposite their respective names in said table, with interest thereon at the rate of 6 per cent per annum from the first day of the month next succeeding the dates on which the shipments in question were unloaded or loaded at the Chicago stockyards, as reparation on account of the unlawful collection of separate charges, in addition to the line-haul rates, for the loading and unloading of shipments of ordinary livestock, in carloads, at the Chicago stockyards.

And It Is Further Ordered, That in all other respects the said order of December 12, 1927, shall remain in full force and effect.

By the commission.

GEORGE B. MCGINTY,
Secretary.

(Seal)

403 Mr. Godman: I offer in evidence as Plaintiffs' Exhibit 6 an order of the Interstate Commerce Commission entered on the 27th day of November, 1928, in cases No. 9977 and No. 12614.

Mr. McLaughlin: No objection.

Mr. Towner: No objection.

The Court: It may be admitted. This merely corrects typographical errors in the preceding order.

Mr. Godman: Yes, Your Honor, Plaintiffs' Exhibit 6 is a correction by the Commission of certain typographical errors and several of the names which are made in a prior order.

Whereupon said document, marked Plaintiffs' Exhibit 6, was received in evidence, and is in the words and figures following, to-wit:

Ex. 404 PLAINTIFFS' EXHIBIT 6.

ADP

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 27th day of November, A. D. 1928.

No. 9977

The Chicago Live Stock Exchange

v.

The Atchison, Topeka & Santa Fe Railway Company *et al.*

No. 12614

Same

v.

Director General, as Agent, The Atchison, Topeka & Santa Fe Railway Company *et al.*

It Appearing, That on December 12, 1927, the commission entered its order in the above-entitled proceeding, and this

proceeding now coming on for further consideration which has been had, and good cause appearing therefore:

It Is Ordered, That the said order entered herein on December 12, 1927, be, and it is hereby, amended nunc pro tunc by striking out the following:

Fred L. Heyne and D. H. Baker, copartners trading as Baker Heyne & Company

Wm. B. Swinney, Chas. M. Swinney and Thos. E. Swinney, copartners trading as Swinney Bros., successors to Brunker & Swinney

Wm. Gentleman, A. M. Gentleman, C. F. Gentleman and J. G. Gentleman, copartners trading as Wm. Gentleman & Sons.

Knollen Sheep Commission Company

Rosenbaum & Company

W. R. Smith, J. C. Eastes and John Smith, copartners trading as W. R. Smith & Company

Chas. E. Stephens and J. A. Goble, copartners trading as Stephens & Goble

A. Gilmore, C. L. Swanson and C. J. Castenhold, copartners trading as Swanson, Gilmore & Castenhold.

And inserting in lieu thereof the following:

Fred L. Heyne and E. H. Baker, copartners trading as Baker Heyne & Company

Wm. B. Swiney, Chas. M. Swiney and Thos. E. Swiney, copartners trading as Swiney Bros., successors to Bunker & Swiney

Wm. Gentleman, A. M. Gentleman, C. F. Gentleman and G. J. Gentleman, copartners trading as Wm. Gentleman & Sons

Knollin Sheep Commission Company

Rosenbaum Brothers & Company

405 W. R. Smith, J. C. Eastes and John Smith, copartners trading as W. R. Smith & Son

Chas. H. Stephens and J. A. Goble, copartners trading as Stephens & Goble

A. Gilmore, C. L. Swanson and C. J. Castenholz, copartners trading as Swanson, Gilmore & Castenholz.

but that in all other respects the said order shall continue in full force and effect.

By the commission:

GEORGE B. MCGINTY,
Secretary.

(Seal)

406 Thereupon the witness HENRY R. PARK, called on behalf of the plaintiffs, having been duly sworn, was examined in chief by Mr. Godman, and testified as follows:

Direct Examination.

My name is Henry R. Park. I live at 9339 Longwood Drive, Chicago, Illinois. I am Traffic Manager of the Chicago Live Stock Exchange, Union Stock Yards, Chicago, Illinois. I have been such Traffic Manager since May 1, 1919. As Traffic Manager of the Chicago Live Stock Exchange my duties are to take care of all the matters pertaining to the handling of live stock into and out of the Stock Yards at Chicago for the members of the Chicago Live Stock Exchange, that is, of the Live Stock Commission, the commission merchants doing business, receiving and shipping live stock into and out of the Yards, that are members of the Chicago Live Stock Exchange, and their clients, the people for whom they do business. There are approximately one hundred firms members of the Chicago Live Stock Exchange. I would estimate that there are about four hundred fifty individual members. These live stock commission men buy and sell cattle and sheep and hogs on the public market in the Union Stock Yards on commission.

Q. Your work as Traffic Manager, have you to do with the filing and handling of claims on behalf of these live stock commission men?

A. Those are my duties; that is, the handling of claims and complaints, claims covering loss and damage, overcharge, reparation, complaints of any and all kinds that arise on account of difficulties encountered by shippers or receivers of live stock into and out of the Yards.

Q. During the period covered by our declaration here, involved in this law suit, how were freight payments and
407 collections made with respect to the business of the live stock commission men? Tell us how that was done, who presented the bills, who made the payments, etc., in respect to the live stock business coming into the stock yards and leaving the yards.

A. The bills for the freight charges were presented by the Union Stock Yards and Transit Company to the members of our Exchange, and paid by the members of our Exchange to the Union Stock Yards and Transit Company.

Included in those freight bills were the amount of freight

charges, terminal charges, and the amount involved here, and unloading charges of twenty-five cents per car on the inbound shipments.

Q. On the outbound shipments how much per car?

A. Outbound shipments as a rule would be fifty cents per car—I beg your pardon, twenty-five cents in addition to the freight rate.

Q. In addition?

A. Yes, and unless prepaid would be paid by consignee at destination, at some point other than the Chicago Stock Yards.

Q. Now, was there any part of the loading and unloading service charge absorbed by the railroad companies as part of their tariff?

A. Yes, sir.

Q. How much?

A. At least twenty-five cents of the total charge of fifty cents were absorbed by the railroad companies.

Q. What part of the seventy-five cent charge?

A. Fifty cents.

Q. So that the shipper then paid, or the receiver, the commission men at the Yards, twenty-five cents in the case of unloading, and fifty cents in the case of loading?

408 A. Twenty-five cents in each instance.

Q. Twenty-five cents in each instance?

A. Yes, sir.

Q. In addition to these published freight rates?

A. Yes, sir. This loading and unloading charge has always been absorbed by the railroad companies back as far as I can remember, and daily reports are back into the inception of the Yards, and that was in 1867. Federal control commenced December 26, 1917, and continued until March 1, 1920, at 12:01 A. M.

Q. The line haul carriers then passed under the control of the Director General of Railroads?

A. Passed from the control; on December 28, 1917, the railroads of the country passed into the control of the Director General; on March 1, 1920, passed from the control of the Director General to the private corporations owning the railroads.

Q. Under federal control, from your contacts and experience with railroad companies, was there any change in the personnel, that is to say, did the Director General take over the organization of the railroads as they existed at that time and continue the same force of employees?

A. Practically so, Mr. Godman, in general. The change at the Yards was this, that prior—at a certain time in 1918, I think it was the railroads out there all consolidated their agencies, that is up to that point each railroad had its own individual agent doing business, handling their matters, and then at that point, I think it was the early part of 1918, they consolidated and appointed what was then called a join agent, and joint offices, handling all the matters for all the railroads in the Chicago Stock Yards district.

409 Q. And after the railroads were taken over by the Director General and operated under his supervision and management as the agent of the President of the United States, the work went on in practically the same way as it had been, so far as your shippers were concerned?

A. Yes, absolutely; there was no difference in the general handling of the traffic. This one move that I refer to was made simply as a point of economy on the part of the Director General, in order to consolidate and eliminate extra help.

The employees of the railroad corporations thus taken under Federal control became employees of the Director General of Railroads.

Q. Now, during the period of Federal control, which you have indicated by dates, did the Director General of Railroads absorb, as the railroads had theretofore, any part of this loading and unloading charge?

A. The Director General continued, after December 28, 1917, to absorb twenty-five cents of the total charge of fifty cents on unloading, and the Director continued to absorb fifty cents of the total of seventy-five cents on the loading charge, just leaving the unabsorbed portion of twenty-five cents of the into or unloaded stock, and twenty-five cents of the unabsorbed of the loaded or outbound stock.

This increase of twenty-five cents per car was made May 31, 1917.

Q. And how long did that continue?

A. The tariffs were made effective March 1, 1920, discontinuing the charge, but there was some difficulty with some of the lines so that the charge actually was collected by some of the lines from some of our members during the month of March, 1920.

Mr. Towner: Wait a moment on that before you leave
410 it. You mean that the charge sof the Stock Yards Company were discontinued on March 20th?

The Witness: No, I mean, Mr. Towner, effective March

1, 1920, that at that time the railroads went back into the hands of the private owners, the railroads had a proper tariff during that time providing for the absorption of the total amount of loading and unloading charge of the Stock Yards Companies.

Mr. Towner: There was no change made in the amount of these charges, however, was there?

The Witness: Not on that particular date. There was a little subsequent, the charge was increased, but not at that time.

Mr. Godman: Q. The date you have just indicated, March 1, 1920, the Line Haul Carriers had paid whatever had been paid to the Union Stock Yards and Transit Company for this loading and unloading service?

A. Yes, sir.

Q. And they collected it as part of the freight?

A. With the exception, Mr. Godman, that I made, that due to some misunderstanding on the part of some of the railroads during the month of March, and particularly during the early part of March, they did continue to collect the unabsorbed portion, which was an error on their part, and it is really not involved here, but I am stating it in order to get all the facts in.

From that date, with the exception indicated, the railroads have provided this loading and unloading service through the Union Stock Yards and Transit Company, without charge to the shipper or the commission men, excepting the charge made for the through haul. I was familiar with this case when it
was pending before the Interstate Commerce Commis-
411 sion. The claims of the various clients that I speak of were
prepared in my office jointly and in the office of the commission firms, either by myself or under my direct personal supervision. I knew the contents of the claims and verified them. The claims thus prepared by me, or under my supervision, were the claims introduced before the Interstate Commerce Commission in hearings 9977 and 12614, and I there testified, and here testify, that they were made directly by me or under my direct personal supervision, from the records of the commission firms.

I am familiar and acquainted with the persons and the companies named as plaintiffs in this case now on trial, and they are the same persons and plaintiffs who are named in Plaintiffs' Exhibit 4, the order of the Interstate Commerce Commission, as entitled to reparation. I know that of my own knowledge.

Mr. Godman: Q. Did you compile a record or a statement showing the car numbers, the dates of delivery, the contents of the car, the date of shipment and so on, for presentation to the Interstate Commerce Commission, in 9977 and 12614?

A. I did, yes, sir.

Q. And was such a statement filed with the Commission?

A. It was, yes, sir.

Q. From what did you make that statement up?

A. From the original records of the Commission firms, wherein their records are kept, showing the amount of freight charges and the different items paid to the Stock Yards companies on these shipments.

Q. What was the aggregate total paid by the plaintiffs in this cause to the Union Stock Yards & Transit Co., or the Director General of Railroads, if you know, or either of them, for this loading and unloading service?

412 Mr. Towner: I object to the question, if the court please, on the ground that knowledge of the witness is secondary, based upon records concerning which there has been no testimony, and they are not produced here, and consequently it is hearsay.

Mr. McLaughlin: We join in that objection.

The Court: I think it is subject to that objection, and I will sustain the objection.

Mr. Godman: You gentlemen have here the records of the Interstate Commerce Commission, have you?

Mr. Towner: I might add, if your Honor please, and not intending to interfere with Mr. Godman's examination, but for the purpose of clarity, we have present—I say we—the defendants have present in this court a complete record before the Interstate Commerce Commission, which includes the documents that I assume Mr. Park has just undertaken to testify about, and it is our intention to offer them in evidence, after the plaintiffs rest.

Mr. Godman: Well, I will offer that statement now, if you gentlemen will produce it.

Mr. McLaughlin: Well, it is Adams' Exhibit 1-A, isn't it, Mr. Park?

The Court: That is a good way to get at it.

Mr. Towner: Let me ask Mr. Park one question:

Q. This statement you have just testified about, Mr. Park, is that the statement that was introduced in the hearings before the Commission upon the hearing of October 3, 1922, and which was marked by the Commission Exhibit 1-A, was it not?

The Witness: Yes, sir.

Mr. Towner: Q. And you have turned over to me a copy of that exhibit, haven't you?

Mr. Park: I have.

413 Mr. Towner: Q. And is contained in that coffin-like box over there, isn't it?

A. It is.

Mr. Towner: Q. That is available for introduction if you wish.

Mr. Godman: If you will produce it.

Mr. Towner: Well, there it is.

Mr. Godman: You raised the objection; I was trying to get at this in a short way, but you want the statement in, and let us put it in.

Mr. Towner: I am not introducing this. I understood Mr. Godman wished to put it in, and if he does, there it is available for introduction by him.

Mr. Godman: May I have it?

Mr. Towner: Sure.

Mr. Godman: I have never had the box.

Mr. McLaughlin: The keys to the box, your witness has the key to the box. We simply have possession of the box.

Mr. Godman: You have the box and we have the keys.

Mr. Towner: The Stock Yards Company furnished the box and the lock, and Mr. Park furnished the exhibit.

Mr. McLaughlin: And kept the keys.

Mr. Towner: And then the exhibit was deposited in the box, and the lock was locked, and Mr. Park has the key.

Mr. Godman: I will ask the witness to get the statements; if you are insisting upon your technical objection; that is the only way I can offer it.

Mr. Towner: Very well.

Mr. Godman: Will you get it, Mr. Park?

The Witness: With the help of another man.

Mr. McLaughlin: We will help you.

414 Mr. Godman: You raised the objection, and I am not to be criticized for putting it in. I wanted to get a summary of that entire matter.

The Witness: Here they are (indicating).

Mr. Godman: Are those the statements which you prepared, Mr. Park?

A. Yes, sir.

Q. All of them?

A. Yes, sir.

Q. You are familiar with those statements?
A. Yes, sir.
Q. And have first-hand knowledge of them?
A. Yes, sir.
Q. State, if you please, Mr. Park, how many carloads of shipments are accounted for in this chest, which you have now identified as Exhibit 1-A, which was before the Interstate Commerce Commission?

Mr. Towner: Now, your Honor, please, I have an objection to that. The objection is this: That this document was introduced in the hearings before the Commission; the Yards company made very strenuous objection to it on account of its incompetency, on the ground that it had not been properly proven, on the ground that the records upon which it was based were not records of the Yards company, had not been produced, nor had they been identified by any witness who had knowledge of the facts. That objection before the Commission was overruled, and the fact that it was overruled forms one ground of attack which we propose to make upon the Commission's order. The witness is now asked to testify, upon the same faulty premise, to the same conclusion, that the Commission permitted him to testify in the hearings before it. We have the same objection to the evidence that was had before the Commission, namely, that the witness has no personal knowledge of the facts; that his evidence is
415 based upon records which have not been proven, nor produced; that it is secondary evidence, and it is hearsay, and is not competent to bind my client.

Mr. McLaughlin: We object, on the further ground that the document itself has not yet been offered in evidence, and therefore it is improper to show the compilations or the result of the figures contained in that document until after the document has been offered in evidence.

Mr. Godman: The question I am asking the witness is merely to state whether he knows how many carloads of shipments were involved in this hearing before the Interstate Commerce Commission, where these plaintiffs were awarded a reparation, just the number of carloads, if he knows; he is the Traffic Manager there.

Mr. Towner: That question, however, your Honor, if that is what the question is, I though it went further than that—

Mr. Godman: Then I will withdraw that and ask that question.

Mr. Towner: That does not cure the objection because the

witness' knowledge of the facts, even as testified to by him, rests, as I say, upon an examination of the records of the multitudinous Commission men's records which have not been produced, either here or before the Commission, concerning which there is no testimony. Mr. Park might testify as to what these records show, but even if he did that it could have no legal effect in the absence of some identification and proof as to the correctness of the record. I therefore make the same objection upon the same grounds.

Mr. McLaughlin: And I join in it.

The Court: I will overrule the objection.

Mr. Towner: Exception.

The Court: He may answer.

Mr. Godman: You may state.

416 The Witness: A. 560005 cars.

Mr. Godman: Q. Did you compute the aggregate amount of the loading and unloading service charge which was made on that number of carload shipments?

A. That is, I assume, Mr. Godman, you mean over and above the tariff amount?

Q. Yes, the excess charge.

A. In other words, the excess charges?

Q. Yes.

A. Yes, sir. That is 140—

Q. I asked you if you had computed them?

A. I have, yes, sir.

Q. State what they amounted to.

Mr. Towner: I object to the question on the same ground that I objected to the previous question, namely, not based upon the witness' knowledge, and shown to be based on evidence, not proven, not produced, secondary, hearsay, and not competent to bind my client.

The Court: Overruled.

Mr. Towner: Exception.

The Witness: A. $140,001.25.

The period covered by those items was from December 28, 1917, to March 1, 1920. I am familiar with the manner in which the loading and unloading service is performed by the Union Stock Yards. During the period about which I have been questioned, when these shipments were made, this service was performed by the Union Stock Yards and Transit Company, one of the defendants in this case, and they have maintained a corps of men just to do that service. No one other than the Stock Yards Company's employees is permitted to

do that service, or was permitted during that period to do that service. The live stock shipments usually arrived at the
417 Yards during the night. Shipments generally start in, we will say, at 6:08 P. M. on Sunday evening and all unloaded by about six o'clock in the morning; during the rest of the week they arrive from about ten P. M. until about six A. M. during the night. Our heaviest receipts are Sunday night and Wednesday night for the Monday and Thursday market. The next in the matter of importance as to the number of cars is Monday night and Tuesday night; Monday night for Tuesday market and Wednesday night for Thursday market.

Q. And about how man carloads of live stock were there at the Stock Yards on an average on Sunday night?

A. Oh, for instance, Monday of this week, and it is a fair average, we had 1,627 cars. The average weekly receipts of carloads would be from 4,500 to 5,000 cars, and all of the loading and unloading of those cars is done by the Union Stock Yards and Transit Company, and was done during the period covered by our claim.

Cross-Examination by Mr. Towner.

Q. In the opening of your examination this morning you testified with respect to the matter of the payment of the charges of transportation of live stock at the Stock Yards in Chicago during the period of Federal control, did you not?

A. Yes, sir. I also testified on that subject in the hearings before the Interstate Commerce Commission.

Mr. Towner: Q. I direct your attention, Mr. Park, to page 98 of this document, which I have had marked Defendant's Exhibit 1 for identification, and will ask you to state whether or not on that page appears the evidence offered by you before the Interstate Commerce Commission with respect to the subject of the payments of the charges?

418 Mr. Godman: That is supposed to be a stenographic transcript, Mr. Towner?

Mr. Towner: Yes. I might state by way of explanation, it is a stenographic report or transcript of the testimony taken before the Commission, taken in the month of July, 1921.

The Witness: I tried to go back here a little bit in the transcript to locate where my testimony started, and I find

it started on page 96 and continues through 97 and I find on 98 a continuation of that same testimony.

Mr. Towner: On page 96 here is the testimony which relates particularly to the manner in which the charges were paid at the Yards during that period, is that so?

The Witness: I have not read this, Mr. Towner, but undoubtedly I will say that is my testimony. My testimony on the same subject also appears at page 122 of Defendant's Exhibit 1 for identification.

Mr. Towner: Now, referring to the same subject, Mr. Park, you had no intention in testifying this morning on that subject to testify any different than you did in the hearings before the Commission did you?

A. Most assuredly not.

Q. The facts testified to by you before the Commission with respect to that matter are still true and correct, are they not?

A. Yes, sir.

Q. Is this statement you say filed with the Interstate Commerce Commission, Exhibit 1-A, the statement that was offered before the Commission?

A. Yes, sir.

Q. Is that the document that was in the box that Mr. Godman referred to?

A. That is a carbon copy of the original exhibit that 419 was turned over to the Commission as Exhibit 1-A.

Q. Does the amount of the reparation to which you testified include the twenty-five cents charge on all shipments that moved into the Stock Yards during Federal control?

A. No, sir.

Q. Does it include shipments moving both inter- and intra-state commerce during that period?

A. It does.

420 *Cross-Examination by Mr. McLaughlin.*

I spoke about the Director General continuing the operation of the railroads after the President took possession of them, with practically the same employees as those that had been operating the railroads of the Stock Yards by the railway companies before Federal control. The changes after the Director General took charge would have been about the same as they were previous to the Director General's assumption of the properties. The railway companies, before

Federal control, were absorbing fifty cents of the Stock Yard Company's charges for loading, and twenty-five cents for unloading live stock, and these absorptions were provided for in the railway companies tariff. After the Director General took charge he continued to make the same absorptions, and he was continuing to operate pursuant to the same tariff that the railway companies had on file until later on he made changes. I filed Defendant's Exhibit 1-A with the Interstate Commerce Commission on February 25, 1921. This was filed in Docket No. 9977.

Q. That was on the very day that the complaint was filed in Docket No. 12614?

A. That is correct. Mr. McLaughlin, you say we filed it in 9977. We filed 12614 the same time, so possibly there is some technicality there, that I am not qualified to answer upon, whether or not Mr. Hillyer had in mind the filing of that claim—whether there was something technical to it—with 12614, or 9977, so possibly I should qualify my answer on that enough to say that I am not sure just what he had in mind.

Mr. Hillyer: I think that probably the witness has been a little bit misled by your expression "filed." He deliv-
421 ered it, as I recall it, he delivered to the Commission on the date that he gave you, February 25, 1921.

The Witness: That is correct. I am stating what time it was first delivered. Possibly I should have used the word "delivered" instead of "filed." It was filed later on in a regular hearing of the Interstate Commerce Commission at the Stock Yards, and received by the Interstate Commerce Commission and marked by them as Exhibit 1-A.. The exhibit was introduced originally I think in the hearing at the Union Stock Yards in Chicago, and received by the Commission and marked by them as Exhibit 1-A, the original claim.

Q. You didn't file anything with the Commission marked Exhibit 1-A until October, 1922, you say?

A. That was the hearing, that is correct, the hearing in the Stock Yords, Chicago.

Mr. McLaughlin: I am trying to get at the time that Exhibit 1-A was marked an exhibit in the hearing before the Interstate Commerce Commission.

The Witness: That was at a hearing of the Union Stock Yards, Chicago, in the Exchange building, before Examiner Satterfield.

Mr. McLaughlin: October 3, 1922, wasn't it?

A. That sounds like it, but I am not sure as to date, Mr. McLaughlin, I don't want to testify to it.

Q. So that you are in error in saying that Exhibit 1-A was filed in February, 1921?

A. Well, I am just trying to avoid any of your technicalities. I delivered that claim right there to the office of the Interstate Commerce Commission on February 25, 1921, and there is no if's or and's about that.

422 Mr. McLaughlin: Q. You did not deliver the document that is in this frame box to the Commission in February, 1921, did you?

A. I did turn over to the Commission a copy of it.

Q. I am not asking that; I will ask to strike out the answer.

Mr. Hillyer: You mean the original?

The Witness: That is what I mean by the copy, that is a copy of the original that was turned over to the Commission, was delivered to the Commission physically by me on February 25, 1921.

The Court: These are not the identical documents that you turned over?

The Witness: No, sir, they are the carbon copies of the original documents.

Mr. McLaughlin: Q. You did not commence the performance of your duties until some time in 1919?

A. May 1st, 1919.

Q. And you had nothing to do with the handling of any of this stock, or the payment of any of these charges, did you, personally?

A. As a Traffic Manager, I had, and every one of these individual commission firms at the Yards, it was my duty to watch the payment of their freight charges, to see that the correct amount was paid, and no more, and to see that they were paid, and therefore, Mr. McLaughlin, it was my duty to go into the Commission firms' offices from time to time, and go into all of them, and examine their original records over a period back two years prior to the time that I assumed the position of Traffic Manager of the Exchange, because of the fact it was possible to file overcharge claims, or make refunds to carriers for that period previous to the two years that I assumed this position, and therefore I want to say to you that I was intimately acquainted with the records in the Commission's firms' offices.

423 Q. My question was you had nothing personal to do with the handling or paying of these carloads of stock?

A. If you assume that from the answers I have given you, you are wholly mistaken because I did have personal contact with them, yes, sir.

Q. What did you do with reference to receiving any carloads of this stock?

(No response.)

Q. If you did have anything to do with receiving any carloads, tell the jury about it?

A. I have just stated that as Traffic Manager for these Commission firms it was my duty, and I did inspect their records.

Q. What did you do in the performance of your duty in receiving any carloads of stock? Take one thing at a time?

A. Checked their freight records, their payment of freight charges, to see that they were proper.

Q. That did not have anything to do with receiving carloads of stock?

A. I never unloaded any of the stock.

Q. You were not there to see it unloaded?

A. Yes, I have seen them unloaded, thousands and thousands of carloads of stock.

Q. But without paying particular attention to what commission man's stock it was or what shipper's stock?

A. I would not say that, but I will say this, and it may suit your purpose, I have never kept a record of each car; I say 3244 unloaded in a single day.

Q. That is not my purpose. You misconceived it entirely. I want to know whether or not what you are testifying to about is something you gleaned from looking at the rec-
424 ords of the commission men, or in some other way?

A. It is taken from actual contact, in watching them unload stock, seeing how they unloaded, how they handled it, following the bills through the Stock Yard Company offices, through the joint agency offices, personally, into the commission firms' offices, and there seeing them paid.

Q. How many of the bills did you so follow?

A. Oh, a very small percentage of the aggregate, necessarily.

Q. You did not follow this 540,005, did you?

A. 560,000 cars, no, sir.

Q. And you did not pay any of this money over, did you?

A. Not personally, no; I O.K.'d the payment of them.

Q. You did not see any of the money paid over, did you?

A. Yes, I saw the checks, and approved the payments of a great quantity of them.

Q. Great quantities of them?

A. Yes, sir.

Q. As a rule, doesn't the Commission man check the bill, and after getting the weight of the stock and making allowances for the fill, doesn't he put the weight to be charged as freight down on the bill and compute the amount of the freight rate, and then doesn't he pay that bill, and it comes back to you, without consulting you, as a rule?

A. In a vast majority of cases he does that, but he consults me on a certain percentage of them.

Q. If he is in doubt about the matter, and needs expert advice, then he consults you?

A. That is about the situation.

Q. The routine is that the commission man helps make out that bill by adding the correct weight and computing the amount of the freight that will be chargeable, and returns it to the Stock Yards Company or the railroad, and by and 425 by that same document comes back to him, and he pays the bill by writing his check?

A. That is right.

Q. And you as a rule have nothing to do with it?

A. I would say I do have something to do with it, because I am charged with the responsibility of seeing that these payments are correct.

Q. Yes, but you do not see one in a thousand of them, do you?

A. Yes, I see one out of a thousand and more than that, but I don't know what percentage I see. I watch them in a general way, and see that the correct amount of the freight charges are paid.

Q. So that in a large measure, all of this information that you gathered together and put in this document you call Exhibit 1-A was material that you got looking at the bills and the records of the commission men?

A. Yes, sir, and from their check stubs.

Q. And the check stubs?

A. Yes, sir, that is correct.

Mr. McLaughlin: I think that is all.

Mr. Godman: Am I correct in my understanding, Mr. Towner, that there is no claim made by you that the testimony of Mr. Park before the Interstate Commerce Com-

mission, to which you called his attention, is in conflict or contrary to his testimony here?

Mr. McLaughlin: There is not any conflict, Mr. Godman.

Mr. Godman: Is that your position, too, Mr. Towner?

Mr. Towner: I cannot conclude myself on that, other than the fact that Mr. Park, who testified before the Commission, said that he testified correctly.

426 Mr. Godman: That is all right. I understood you made the statement in one of your questions to Mr. Park, when you asked him whether or not he testified correctly before the Interstate Commerce Commission, leaving the impression that possibly his testimony there was different from the testimony here, and I wanted to clear that up. I understand that is not your position.

Mr. Towner: I do not think he testified differently. I cannot promise that because I have not looked through all the testimony before the Commission.

Mr. Towner: Now, on behalf of the Stock Yards Company, I wish to make a motion to strike from the record all of the witness Park's testimony with respect to the number of carloads involved in this reparation claim, and also in respect to the amount of money involved, on the ground that it affirmatively appears from his cross-examination that all of his information is derived from these other records of commission men, operating out of the Stock Yards, that he has no personal knowledge of his own upon which he can make a statement he did make; these records not having been identified, produced, or proven, it seems to me makes his testimony objectionable, secondary and hearsay.

Mr. McLaughlin: And that the Director General joins in that objection and motion.

Mr. Godman: May I suggest that Mr. Park testified here that he is Traffic Manager for each and every one of these plaintiffs, and in that respect an employee of each one of them, and therefore he has first-hand knowledge, in so far as it is possible to have knowledge, in the ordinary course of business. I think he has explained fully what his duties were, and the objection seems to me to go to the weight of the testimony and not to its incompetency.

427 Mr. Towner: I submit that as an additional circumstance. Mr. Park has not even testified that this 1-A is even a copy of these records of the commission men. His testimony goes no further than the statement that he consulted these records and took this information from them.

Now, then, if his testimony is to be given credence, we are asked to believe a number of things, and the first one is that the records themselves are correct. The second, we are asked to believe is that the employees of Mr. Park,—he did not do it all himself, that the employees of Mr. Park correctly drew off from these records, concerning which there has been no testimony, was was shown on them. Now, the fact of the matter is that Mr. Park personally did not even do all of this drawing off. The testimony is that he, either he did so, or it was done under his direction, so that as the record stands, we have first no proof of the records of the commission men were correct. We have, secondly, no proof as to what form they were in, or whether this Exhibit 1-A is a copy. We have thirdly no testimony of the men that drew them off, assuming that drawing off was proper, all we have is Mr. Park's testimony that it was done either by himself or under his supervision, and that it is based upon these records upon which there has been no proof whatever.

The Court: I think the way the record stands now it is in rather bad condition, and I will sustain the objection as made and strike out the testimony that was asked to be stricken out.

Mr. Godman: That is the testimony of Mr. Park in respect to this Exhibit 1-A, and the amount which he said was paid for this loading and unloading service, that is what goes out.

The Court: Did your objection go that far?

428 Mr. Towner: No, my motion was to strike out on the record all of Mr. Park's testimony relative to the number of cars and the amount of reparation, that is the only thing.

Mr. Godman: That is your motion?

Mr. Towner: That is the only evidence he put in that was based directly on this exhibit.

The Court: I grant that motion.

To which ruling of the court the plaintiffs by their counsel then and there duly excepted.

Mr. Godman: We entered into a stipulation, if the Court please, which I believe may be properly referred to now. This stipulation, if Your Honor please, provides in the last paragraph that either parties reserve the right to object to the relevancy and materiality of some of the facts which are stipulated to be the true facts, assuming that the testimony in respect to those matters is admissible. Our stipulation is that the facts are as stated here.

We have agreed that as far as the exhibits are concerned the various tariffs referred to in the record before the Interstate Commerce Commission, the transcript of testimony and all that, copies may be used and referred to by both sides, as may be necessary, and that no objection will be made on the ground that they have not been properly identified as original documents. That is correct, is it?

Mr. McLaughlin: Yes, that is correct.

The Court: Do you expect the court to pass upon the relevancy as the stipulation is being read?

Mr. Godman: If the question is raised.

Mr. Towner: I can say now there will be no question raised by the Stock Yards Company as to any matter covered by the stipulation.

Mr. McLaughlin: Nor by the Director General.

The Court: Very well.

429 Mr. Godman: There is one feature that the plaintiff objects to on the theory that it is irrelevant, and that refers to the tariffs, official classification so-called, which the Director General and the Stock Yards and Transit Company referred to in the stipulation.

Mr. Towner: On that point I will say that the Stock Yards Company was not a party to this classification. You will find a paragraph in the stipulation to the effect that the Stock Yards Company did not participate, nor was it a party to any of the railroad tariffs, so that that matter of classification rests between you and Mr. McLaughlin.

Mr. Godman: Mr. McLaughlin insists on having this in; he desires to have it in. I don't think they are relevant.

The Court: When we reach those we can argue them.

Mr. Godman: Yes.

And thereupon the aforesaid stipulation of the parties was read to the jury, and is in the words and figures as follows:

It is hereby stipulated and agreed by and between the parties in the above entitled suit, by their respective attorneys, as follows:

That in the trial of said cause in the United States District Court for the Eastern Division of the Northern District of Illinois, the facts hereinafter set forth shall be taken as true, and that all tariffs, documents and exhibits referred to herein and made a part hereof, either by reference or by being attached hereto, may be offered in evidence on the trial of said cause without further identification or authentication, and

when so offered in evidence same shall have the same force and effect as if original documents, properly identified and authenticated, as provided by law.

430 (1) That the effective charges and certain matters pertaining thereto for loading live stock into railroad cars and unloading live stock from railroad cars at the Union Stock Yards, Chicago, Illinois, for the period between May 21, 1917, and January 26, 1921, which includes the period of Federal control of railroads, were published by defendant, the Union Stock Yard and Transit Company of Chicago, hereinafter called Stockyards Company, in its own tariffs, and supplements thereto, which were filed with the Interstate Commerce Commission.

(2) That said tariffs and supplements were as follows: U. S. Y. & T. Co. Tariff No. 1, I. C. C. No. 1, effective May 30, 1913; U. S. Y. & T. Co. Tariff No. 2, I. C. C. No. 2, effective May 21, 1917; U. S. Y. & T. Co. Tariff No. 3, I. C. C. No. 6, effective June 21, 1917; Supplement No. 1 to U. S. Y. & T. Co. Tariff No. 3, I. C. C. No. 6, effective September 1, 1917; Supplement No. 2, to U. S. Y. & T. Co. Tariff No. 3, I. C. C. No. 6, issued September 1, 1917; Supplement No. 3 to U. S. Y. & T. Co. Tariff No. 3, I. C. C. No. 6, issued December 30, 1917; Supplement No. 4 to U. S. Y. & T. Co. Tariff No. 3, I. C. C. No. 6, issued June 10, 1910; Supplement No. 5 to U. S. Y. & T. Co. Tariff No. 3, I. C. C. No. 6, effective December 31, 1918; Supplement No. 6 to U. S. Y. & T. Co. Tariff No. 3, I. C. C. No. 6, effective November 1, 1920; and Supplemental No. 7 to U. S. Y. & T. Co. Tariff No. 3, I. C. C. No. 6, issued November 1, 1920; and Supplement No. 8 to U. S. Y. & T. Co. Tariff No. 3, I. C. C. No. 6, effective January 26, 1921.

(3) That copy of each of the aforementioned tariffs and supplements, duly certified by George B. McGinty, Secretary of the Interstate Commerce Commission, is attached hereto, and made a part hereof, and numbered Exhibit 1.

(4) That the property of said defendant, Stockyards Company, was not taken over or operated by the Gov-
431 ernment during the said period of Federal control of railroads, which commenced at noon, December 28, 1917, and ended at midnight, February 29, 1920.

(5) That prior to the said period of Federal control of railroads, the line-haul carriers entering Chicago, Illinois, and engaged in the transportation of live stock to and from the said Union Stock Yards, were not named as parties to

any of the aforementioned tariffs or supplements of defendant, Stockyards Company.

(6) That during the said period of Federal control of railroads the Director General of Railroads was not, either through any line which was taken over or operated by the Government, or otherwise, named as a party to any of the aforementioned tariffs or supplements of defendant, Stockyards Company.

(7) That prior to said period of Federal control of railroads, L. A. Lowrey, as the duly authorized and appointed agent of the said line-haul carriers entering Chicago, Illinois, and engaged in the transportation of live stock to and from the said Union Stock Yards, filed with the Interstate Commerce Commission his Tariff No. 20-J, which became effective July 22, 1917, under I. C. C. No. 37, providing among other things for the absorption by said line-haul carriers of the aforementioned charges of defendant, Stockyards Company, in the sum of fifty cents (50c) for loading each carload of live stock into railroad cars, and in the sum of twenty-five cents (25c) for unloading each carload of live stock from railroad cars at the said Union Stock Yards, Chicago. The charges of the said Stockyards Company for loading and unloading live stock at said Union Stock Yards from the time same were established to May 21, 1917, was fifty (50c) cents for loading and twenty-five (25c) cents for unloading each carload of live stock and said amounts were absorbed in
432 full by the line-haul carriers during said entire period.

(8) That at noon, December 28, 1917, the Director General of Railroads took over the lines of railroad of said line-haul carriers entering Chicago, Illinois, which were engaged in the transportation of live stock to and from said Union Stock Yards, and applied the said Lowrey's Tariff No. 20-J, I. C. C. No. 37, and supplements thereto as hereinafter described.

(9) That during the said period of Federal control of railroads, the Director General of Railroads published two supplements to said Lowrey's Tariff 20-J, I. C. C. No. 37, adopting in form and substance and carrying forward and continuing in force during the said period of Federal control the absorptions as provided for in said Lowrey's tariff, of the aforementioned charges of defendant Stockyards Company, for loading live stock into railroad cars and unloading live stock from railroad cars at the said Union Stock Yards, which supplements were duly filed with the Interstate Com-

merce Commission under Nos. 15 and 20, and became effective August 30, 1919, and December 31, 1919, respectively.

(10) That subsequent to the said period of Federal control, said L. A. Lowrey, as the duly authorized and appointed agent of the line-haul carriers entering Chicago, Illinois, and engaged in the transportation of live stock to and from the said Union Stock Yards, published a supplement to his said Tariff 20-J, I. C. C. No. 37, providing for the absorption in full of the charges of defendant, Stockyards Company, for loading ordinary live stock into railroad cars and unloading ordinary live stock from railroad cars at the said Union Stock Yards, which supplement was duly filed with the Inter-
433 state Commerce Commission as Supplement No. 31 to Tariff 20-J, Supplement 24 to Tariff I. C. C. No. 37, and became effective April 1, 1920.

(11) That copies of the pages of said Lowrey's Tariff 20-J, I. C. C. No. 37, viz: title page, and pages 2, 3, 6, 7, 8, 66, 67, and 72; of title page and pages 2 and 3 of Supplement No. 15 thereto; of title page and pages 2 and 3 of Supplement No. 20 thereto; and of title page and page 14 of Supplement No. 24 thereto; which have been duly certified by George B. McGinty, Secretary of the Interstate Commerce Commission, are attached hereto, made a part hereof, and numbered Exhibit 2.

From paragraph 12, Mr. Hillyer, on down to where? What are the paragraphs you object to?

Mr. Hillyer: Paragraphs 12 to 25 inclusive.

Mr. Godman: Paragraphs 12 to 25 inclusive refer to official classifications, that the Director General relies on, and it is those we object to. And I will go on beginning with the next paragraph, 26.

The Court: Twelve is the one you are on now?

Mr. Godman: Yes, from 12 to 25.

The Court: Both inclusive?

Mr. Godman: Yes.

The Court: Those you will object to?

Mr. Godman: Objections will be made to them.

The Court: Yes.

Mr. Towner: The objection can come up when we offer them.

Mr. Godman: Yes. The next paragraph I will read is 26.

434 (26) That the Stockyards Company has never joined in or been a party to any tariff or tariffs issued by the

railroads or line-haul carriers, or the Director General; has never concurred in any rate or rates published by them in said tariff or tariffs.

(27) That the physical acts of loading all live stock into railroad cars, and of unloading all live stock from railroad cars at the said Union Stock Yards during the period of Federal control, including all live stock involved in this suit, were done and performed by employees of the defendant, Stockyards Company, which maintained forces of employees for such purpose; that the unloading platform, chutes and yards were owned by and were on the premises of the said Stockyards Company.

(28) That the Union Stock Yards and Transit Company of Chicago was and is a corporation created by a special
435 act of the Legislature of the State of Illinois, approved February 13, 1865, and has its principal office and place of business in the city of Chicago, Illinois.

(29) That Andrew W. Mellon was, at the time of the commencement of said suit, and still is, the agent designated by the President pursuant to the provisions of Section 206, Transportation Act, 1920, against whom suits may be brought on causes of action arising out of the possession, use and operation by the President of the Railroads and systems of transportation named in paragraph 3 of said petition, under the Federal Control Act; that William G. McAdoo and Walker D. Hines were Directors General of Railroads during the Federal control period beginning December 28, 1917, at twelve o'clock noon, and ending at 12:01 a. m. March 1, 1920; that said William G. McAdoo served as such Director General of Railroads from December 28, 1917, to January 10, 1919, and Walker D. Hines served as such Director General of Railroads from January 10, 1919, to March 1, 1920; that all of said railroads named in the petitions in said cause had during said period lines of railroad extending into the Eastern Division of the Northern District of Illinos, except Toledo, St. Louis & Western Railroad, and that this court would have jurisdiction except for Federal control if the said causes of action had arisen against the said railroads and systems of transportation; that pursuant to Section 206-A, Transportation Act, 1920, the President, on or about March 1, 1920, designated Walker D. Hines as the Agent provided for therein, who continued as such agent until May 18, 1920, when John Barton Payne was duly designated by the President as his successor; that said John Barton Payne con-

tinued as such agent until March 28, 1921, when James
436 C. Davis was appointed by the President as his successor as such agent; that James C. Davis continued as such agent until December 31, 1925, when Andrew W. Mellon succeeded to such office by appointment duly made by the President under date of December 14, 1925, and the said Andrew W. Mellon still continues in office as such agent.

(30) That on the filing of the Stockyards Company's Supplement No. 1 to its tariff I. C. C. No. 6, effective September 1, 1917, protests were filed with the Commission. Subsequent thereto and before the effective date of said supplement the Commission suspended same, and set it down for hearing under Investigation and Suspension Docket No. 1118, and thereafter extended such suspension order from time to time.

(31) That on November 17, 1917, the Chicago Live Stock Exchange filed a complaint with the Interstate Commerce Commission; that said complaint was docketed under I. C. C. Docket No. 9977; that answers were filed by the defendants named therein, and said complaint was consolidated with the said Investigation and Suspension Docket No. 1118; that after full hearing of cases so consolidated the Interstate Commerce Commission, on February 11, 1919, rendered its decision. The opinion and findings of the Commission was in writing and is reported in 52 I. C. C. 209, which opinion and findings as so reported are by reference made a part hereof. A
437 true copy of said complaint of the said Chicago Live Stock Exchange is by reference made a part hereof.

(32) That on or about March 31, 1919, the Chicago Live Stock Exchange and said Stockyards Company filed petitions for rehearing in said proceeding.

(33) That on March 13, 1919, the Commission amended its said order of February 11, 1919, entered in said Docket No. 9977, by requiring cancellation by the said Stockyards Company of its Supplement No. 1 to its Tariff I. C. C. No. 6, nunc pro tunc, as of December 31, 1918. Such order was complied with by said Stockyards Company by filing its Supplement No. 5 to I. C. C. tariff No. 6, on the 29th day of March, 1919, restoring and continuing in effect the loading and unloading charges contained in its Tariff I. C. C. No. 6. A copy of said Supplement No. 5 so filed pursuant to said supplemental order is attached hereto as a part of Exhibit 1, and is made a part hereof. A copy of said order of the Commission is by reference made a part hereof.

(34) That on or about April 14, 1919, the Commission, in a supplemental order, reopened said proceedings, for further hearing, and named the Director General as a party respondent. A true copy of said supplemental order is set out on pages 17 and 18 of the petition in above entitled cause, and is by reference made a part hereof.

(35) That after the re-opening of said proceedings pursuant to said supplemental order of April 14, 1919, a further hearing was had and further testimony was taken before Chairman Aitchison of the Interstate Commerce Commission, and Examiner Gerry at Chicago, Illinois, on May 20, 21, and 22, 1919.

(36) That after such further hearing the Commission on July 15, 1920, rendered its decision making report there-
438 of in writing, same being reported in 58 I. C. C. 164, which report, opinion and findings of the Commission, as so reported, are by reference made a part hereof.

(37) That on or about February 25, 1921, the Chicago Live Stock Exchange filed a complaint with the Interstate Commerce Commission naming as defendant John Barton Payne, Director General as Agent, the Union Stock Yards and Transit Company, Atchison, Topeka and Santa Fe Railway Company and other railway companies, and said complaint was docketed as I. C. C. No. 12614. The defendants named therein were duly notified and filed answers. Said complaint so filed is by reference made a part hereof. A printed list containing many thousands of names of persons, firms and corporations alleged to have shipped live stock to, or to have received live stock at, or to have shipped live stock from the Union Stock Yards, Chicago, during the time covered by the said complaint, was filed therewith and described therein as Appendix A. A copy of said Appendix A so filed with said complaint may be offered in evidence on the trial of this cause by any party hereto without being certified as a true copy.

(38) That a hearing was had on said complaint I. C. C. Docket No. 12614, before Examiner Howard Hoamer at Chicago on July 14, 1921. That on or about April 8, 1922, the Interstate Commerce Commission made an order re-opening said I. C. C. Docket No. 12614, and said I. C. C. Docket No. 9977, for further hearing and ordered that the two cases be consolidated and assigned for hearing at a time and place to be fixed by the Commission. Said order is by reference made a part hereof. Pursuant to said order further hearings were had at Chicago, Illinois, before Examiner Lawrence Satter-

field on October 3, 4, 5, 6, and 9, and November 6, 7, 8 and 9, 1922, and at Boston, Mass., before Examiner Paul O. Carter on February 24, 1923.

439 (39) That after such hearing, and on or about June 2nd, 1925, the Commission rendered its decision making report thereof in writing, same being reported in 100 I. C. C. 266, which report and findings of the Commission as so reported is by reference made a part hereof. On December 12, 1927, the Commission made its further supplemental order in said cases, which order is by reference made a part hereof. On January 11, 1926, the Commission made a further order in said cases, a copy of which order is attached hereto as Exhibit 8 and made a part hereof. On May 14, 1928, the Commission made its further order in said cases, which order is by reference made a part hereof. On November 27, 1928, the Commission made its further order in said cases, which order is by reference made a part hereof.

(40) The hearings on the various complaints herein mentioned, and in the said proceedings in I. & S. Docket No. 1118, and I. C. C. Dockets Nos. 9977 and 12614, were held at Chicago on November 8, 1917; at Chicago on March 13 to March 16, inclusive, 1918; at Chicago on May 20 to May 22, inclusive, 1919; at Chicago on July 14, 1921; at Chicago on October 3 to October 6, inclusive, 1922; at Chicago on October 9, 1922; at Chicago on November 6 to November 9, inclusive, 1922; and at Boston on February 24, 1923. On all said hearings, the testimony was taken down in shorthand by an official reporter, and transcripts of all such testimony and the exhibits mentioned therein were filed in said proceedings in the office of the Secretary of the Interstate Commerce Commission, and the transcripts so filed and exhibits mentioned therein and received in evidence, contain all of the evidence taken in said proceedings and each of them, and all of the evidence before the Commission in rendering the various

440 decisions and opinions, and in making the various findings hereinbefore referred to. Said transcripts and exhibits so filed and each of them are by reference made a part hereof, and may be received in evidence on the trial of this suit when offered, by any party, by copy, without further identification or authentication than the statement of the party offering same that the documents offered are copies of such transcripts and/or exhibits filed with the Secretary of the Interstate Commerce Commission.

(41) A true copy of the docket of the Interstate Commerce Commission in said proceeding I. & S. No. 1118 showing all

entries therein from the initiation of said proceeding by the Commission to date hereof, is attached hereto, marked Exhibit 9, and made a part hereof.

(42) A true copy of the docket of the Interstate Commerce Commission in said I. C. C. No. 9977, showing all entries therein from the filing of the complaint therein by the Chicago Livestock Exchange on November 17, 1917, to the date hereof, is attached hereto, marked Exhibit 10, and made a part hereof.

(43) A true copy of the docket of the Interstate Commerce Commission in said I. C. C. No. 12614, showing all entries therein from the time of the filing of the complaint by the Chicago Livestock Exchange, on February 25, 1921, to the date hereof, is attached hereto, marked Exhibit 11, and made a part hereof.

(44) All shipments of livestock involved in this suit consisted of carloads moved on carload ratings as ordinary livestock. In no case was the rate for transportation based on value of the livestock other than the value prescribed by the Interstate Commerce Commission for ordinary livestock.

441 (45) The testimony taken at Boston February 24, 1923, before Examiner Carter was in reference to amount of damage claimed by certain packing companies, none of whom are involved in this suit, and such testimony is not relevant or material to any issue in this suit and has no bearing thereon.

(46) This stipulation is without prejudice to the right of any party hereto to object to the relevancy or materiality of any fact stipulated herein to be true or of any exhibit or portion identified herein and attached hereto or of any document or other matter made a part hereof, by reference.

Each party hereto reserves and has the right to offer other or further testimony on the trial of this cause, not, however, contradictory of any fact herein stipulated to be true.

(Signed) SIMS GODMAN & STRANSKY
Attorneys for Plaintiffs.

(Signed) EDGAR R. HART
A. A. MCLAUGHLIN
Attorneys for Defendant A. W. Mellon, Director General of Railroads, as Agent.

(Signed) WINSTON STRAWN & SHAW
Attorneys for Defendant Union Stock Yard & Transit Company.

442 Mr. Godman: If the Court please, the petitioner in this case, in addition to asking for the reparations, asks for reasonable attorneys' fees which he is allowed under the statute and can recover.

Now it may be that is a question that can be considered by the Court after the case is over and the necessity for it should arise, or if it is agreeable to counsel—we are not prepared to put on any expert testimony on that subject at this time; if it is agreeable to counsel to go ahead with their testimony on the merits we will rest our case with the reservation that we may offer that testimony at an appropriate time later, if that is agreeable.

The Cour: Well, it will be all right to close the case with that reservation?

Mr. Towner: We are willing to stipulate that the matter can be taken up after a verdict without prejudice and be disposed of by the Court.

Mr. Godman: Well, I am willing to go to that extent, but now do you agree that we rest our case, reserving the right to put testimony on that subject either to the Court or before the jury at a later time?

Mr. McLaughlin: It is agreeable to me.

Mr. Towner: Reservation only as to evidence on that one subject?

Mr. Godman: Yes.

Mr. Towner: That is agreeable to me, Your Honor.

The Court: Very well.

Mr. Godman: Plaintiffs rest with that reservation.

And Thereupon the Plaintiffs Rested Their Case in Chief.

443 Thereupon the defendants, to maintain the issues on their part, introduced the following evidence, to-wit:

Mr. Towner: If Your Honor please, on behalf of both defendants there is certain evidence that I will offer at this time. I might add, by way of explanation, both to the court and to the jury, that this is evidence which is referred to in the stipulation that Mr. Godman read. The matters that we propose to introduce are matters that are referred to in the stipulation and which are there agreed as being available.

There is attached to the stipulation which Mr. Godman read a certain number of exhibits which are referred to in the stipulation; I think as Defendants' Exhibit 1, I think that is the proper method of numbering them. I will offer

the original of that stipulation, together with the exhibit attached to it and referred to in it. I will go no further than the offer, because I think the stipulation has been read, most of it at least.

Mr. McLaughlin: That might be confusing, because you have that transcript marked Defendants' Exhibit 1.

Mr. Towner: I will straighten that out. This is the original stipulation, with the exhibits that are attached to it. I will offer them as—

The Court: Aren't you encumbering your record by offering the whole stipulation that the plaintiff offered?

Mr. Towner: The fact of the matter is the plaintiff did not offer it, as I understand it; he did not offer the stipulation itself. It will be confusing if the stipulation is not in as an exhibit, for the reason that there are some eight or nine exhibits attached to the stipulation and to intelligently consider these exhibits one would have to have the stipulation before him, so that what we would like to do
444 is to offer the stipulation, together with the exhibits, as one exhibit.

Mr. Godman: We object to paragraphs 12 to 25, both inclusive; to the rest we have no objection.

Mr. Towner: That, I think, Your Honor, raises the question in which Mr. McLaughlin is interested, inasmuch as the exhibit is offered on behalf of the Director General as well as on behalf of the Stock Yards Company, and I will ask him to reply.

Mr. McLaughlin: I would like to suggest that I do not have in my portfolio reference to the Interstate Commerce Act to which I desire to call Your Honor's attention, and if counsel could make objection to this, and Your Honor reserve a ruling on it until tomorrow morning, I will have my reference here.

The Court: Very well; you object to these specific paragraphs?

Mr. Godman: Yes.

The Court: 12 to 25, both inclusive?

Mr. Godman: Yes.

Mr. Towner: The balance will be admitted.

The Court: Yes; all admitted except paragraphs 12 to 25, both inclusive, of the stipulation, to which objection is made and ruling reserved.

Mr. McLaughlin: Your objection goes to the exhibits in these paragraphs as well as the paragraphs themselves?

Mr. Godman: The objection goes to the exhibits in the paragraphs as well as the paragraphs themselves.

Whereupon said document marked Defendants' Exhibit 1, being a stipulation together with exhibits attached, was received in evidence (excepting paragraphs 12 to 25, inclusive, and the exhibits referred to in said paragraphs) and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though
445 fully set out herein. Said Defendants' Exhibit 1 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

446 Mr. Towner: I will next offer as Defendants' Exhibit 2 a copy of the complaint filed by the Chicago Live Stock Exchange before the Commission in this case, I. C. C. Docket 9977, and I will ask that it be marked Defendants' Exhibit No. 2.

Mr. Godman: No objection, Your Honor.

The Court: It may be admitted.

Whereupon said document marked Defendants' Exhibit ..... was received in evidence, and is in the words and figures as follows to-wit:

447 DEFENDANTS' EXHIBIT 2. Defts.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

The Chicago Live Stock Exchange, *Complainant*,
vs.
Atchison, Topeka & Santa Fe Railway Company, *et al.*, *Defendants.*
} I. C. C. Docket No. 9977.

PETITION.

SIMS, WELCH & GODMAN,
Attorneys for Complainant,
Marquete Building,
Chicago, Ill.

HARRY C. BARNES,
Of Counsel.

448 BEFORE THE INTERSTATE COMMERCE COMMISSION.

The Chicago Live Stock Exchange,

Complainant,

vs.

Atchison, Topeka & Santa Fe Railway Company,
Baltimore & Ohio Railroad Company,
Baltimore & Ohio Chicago Terminal Railroad,
Chesapeake & Ohio Railway Company of Indiana,
Chicago & Alton Railroad Company,
Chicago & Eastern Illinois Railroad Company, and W. J. Jackson, Receiver,
Chicago & Erie Railroad Company,
Chicago & North Western Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Chicago Great Western Railroad Company,
Chicago, Indianapolis & Louisville Railway Company,
Chicago Junction Railway Company,
Chicago, Milwaukee & St. Paul Railway Company,
Chicago, Rock Island & Pacific Railway Company,
Chicago, Terre Haute & Southeastern Railway Company,
Cleveland, Cincinnati & Southeastern Railway Company,
Grand Trunk Western Railway Company,
Illinois Central Railroad Company,
Indiana Harbor Belt Railroad Company,
Michigan Central Railroad Company,
Minneapolis, St. Paul & Sault Ste. Marie Railway Company,
New York Central Railroad Company,
New York, Chicago & St. Louis Railroad Company,
Pennsylvania Company,
Pere Marquette Railway Company,
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company,
Toledo & Western Railroad Company,
Union Stock Yard & Transit Company,
Wabash Railway Company,

Defendants.

PETITION.

The petition of the above named complainant respectfully shows:

I.

That The Chicago Live Stock Exchange is an association of persons, firms and corporations incorporated under the laws

of the State of Illinois; that its membership consists of live stock commission merchants and owners and raisers of cattle engaged in the buying, selling, receiving and shipping of live stock in interstate and foreign commerce, and principally in receiving live stock at the Union Stock Yards, Chicago, Illinois, for the purpose of being marketed there; that the said association represents every shipper and receiver of live stock at every station in the United States shipping to and from the public live stock market located at the Union Stock Yards in the City of Chicago, Illinois; that the complainant association and the individual members thereof are now, and have for many years past been engaged in promoting, fostering and improving the live-stock industry throughout the United States and particularly throughout the territory in which the patrons of the Chicago market are located; that shipments of live stock, consisting of cattle, calves, swine, sheep, lambs and goats, are consigned to the individual members of the petitioning association, or are by them shipped to and between points in the several states of the United States and the District of Columbia and between points in the United States and points in foreign countries, and that such shipments in interstate and foreign commerce are made over the lines of the defendant carriers; and that this complaint is brought on behalf of the members of the complainant association severally and collectively.

449 II.

That the defendants, saving and excepting the Union Stock Yard & Transit Company, are, in respect to the activities hereinafter complained of, common carriers engaged in the transportation of passengers and property by railroad by continuous carriage and shipment in interstate and foreign commerce and are particularly engaged in the transportation of live stock to and from the Union Stock Yards in the City of Chicago, Illinois, from and to various points in the different states of the United States and foreign countries, and as such common carriers are subject to the provisions of the Act to Regulate Commerce approved February 4, 1887, and all acts amendatory thereof and supplementary thereto.

III.

The Union Stock Yard & Transit Company, hereinafter referred to as the Stock Yard Company, was incorporated un-

der a special act of the legislature of Illinois, February 13, 1865, which authorized it to locate, construct, and maintain near the southerly limits of the City of Chicago:

"* * * All the necessary yards, inclosures, buildings, structures, and railway lines, tracks, switches, and turnouts, aqueducts, for the reception, safe-keeping, feeding, and watering, and for the weighing delivery, and transfer of cattle and live stock of every description, and also dead and undressed animals that may be at or passing through or near the City of Chicago, and for accommodation of the business of a general union stock yard for cattle and live stock, including the erection and establishment of one or more hotel buildings, and the right to use the same; * * * to make advances of money upon such cattle and live stock for freight or other purposes as may become expedient. * * *"

The charter further provided:

"That said company shall construct a railway, with one or more tracks, as may be expedient, from the grounds which may be selected for its said yards, so as to connect, outside of the City of Chicago, the same with the tracks of all the railroads which terminate in Chicago, the lines of which enter the city on the south between the lake shore and the southwest corner of said city, * * * and to make connections with such suitable sidetracks, switches, and connections as to enable all of the trains running upon said railroads easily and conveniently to approach the grounds selected for said yards, and may make such arrangements or contracts with such railroad companies, or either of them, for the use of any part or portion of the track or tracks of such company or companies which now is or hereafter may be constructed for the purposes aforesaid, as may be agreed upon between the parties; * * * and to transport and allow to be transported thereon between said railroads and cattle yards, all cattle and live stock and persons accompanying the same to and from said yards, and may also transport and allow to be transported between the railroads entering said city, * * * freight and property of every kind as well as stock and cattle. * * *"

450 After its creation it acquired real estate, constructed and operated stockyards, with a stock market, built a hotel for the accommodation of its patrons, and constructed in the stockyards district about 300 miles of railroad track, consisting of main lines connecting with the trunk lines entering Chicago, and a large number of switches to the various industries which had been established adjacent to such tracks.

Prior to December 15, 1897, the Stock Yard Company carried on the stockyards and railroad business, and although it had regular charges for the services it performed, it filed no tariffs with the Interstate Commerce Commission and concurred in none. On December 15, 1897, the Stock Yard Company leased all of its railroad tracks and equipment for a term of fifty years to a corporation known as the Chicago & Indiana State Line Company (hereinafter called the "State Line Company"), retaining for itself the loading and unloading platforms and facilities used in connection with its stockyards business. This lease covered all its railroad and railroad tracks, switches, etc.; roundhouse, repair shops, machine shops, coal chutes, etc., then in existence or theretofore used by the Stock Yard Company in connection with its railroad; and all and singular the equipment and the telegraph lines, instruments, and appurtenances owned or possessed by the Stock Yard Company and used by it in conducting its railroad business. By the terms of the lease, the State Line Company was given the right in the future to maintain and operate upon the lands of the Stock Yard Company additional sidetracks and switch tracks and other appurtenances necessary to reach industrial plants.

Afterwards the State Line Company consolidated with the Chicago, Hammond & Western Railroad Company, and the consolidated company became known as the Chicago Junction Railway Company (defendant herein), and in addition to the railroad leased from the Stock Yard Company, operated a belt line around the City of Chicago. In November, 1907, the Junction Company sold the belt line to the East Chicago Belt Railroad Company, retaining the tracks which had been leased by the Stock Yard Company. The equipment operated by the Junction Company, consisting of locomotives and rolling stock, is owned by the Stock Yard Company, but the Junction Company employs its own engineers and crews.

After leasing its railroad property to the Junction Company, the Stock Yard Company continued to operate its stockyard facilities for loading and unloading cattle and other live stock bound for and coming from points outside the state, and to feed and water live stock in transit over the lines of trunk line carriers, and also to feed, bed, and water live stock shipped to consignees doing business in the stockyards district.

The employees of trunk lines bringing live stock to the stockyards turn over the waybills accompanying such ship-

ments with what are called "Live stock stubs" attached,
451 to the employees of the Stock Yard Company, who use the waybills in unloading and counting the stock, and the waybills and stubs are then sent to the auditor of the Stock Yard Company (being also the auditor of the Junction Company), who retains the stubs and forwards the waybills to the local agents of the trunk lines. The Stock Yard Company advances the charges on such shipments to the trunk lines and collects from the consignees, usually commission men doing business at the stockyards, the moneys it has so advanced for their accommodation.

That thereafter, to wit, on December 1, 1913, the Stock Yard Company of Chicago canceled the lease previously existing between it and the Chicago Junction Railway Company, and entered into a new agreement with the Junction Company, under and by virtue whereof the Stock Yard Company of Chicago divested itself in perpetuity of all property of every kind and character whatsoever, which had been covered by said lease of December 15, 1897.

IV.

That Section 1 of the Act to Regulate Commerce, after defining the term "transportation" to include "all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery * * * and handling of property transported," makes it the duty of every carrier subject to the provisions of the Act "to provide and furnish such transportation upon reasonable request therefor and to establish just and reasonable rates thereto."

That as incidental to its business of transporting or hauling live stock a railroad company must provide means of loading, unloading and caring for such freight pending its delivery to the consignee; that the hauling of the cattle from one point to another and the providing of the cars, tracks, engines and servants for that purpose are no more a part of the service rendered by the carrier than are the loading and unloading and the providing of the appliances and services for those purposes; that the transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered or stored to be delivered to the consignee, if to be found, at such place

as admits of their being safely taken into possession; and that, therefore, the duty rests with each and every one of the defendant carriers herein transporting live stock to and from the City of Chicago, Illinois, to provide such necessary terminal facilities therefor.

V.

That the Stock Yard Company now owns and for many years has owned extensive yards and other facilities for the unloading, loading, storing and marketing of cattle in the City of Chicago, and that these yards have become by the
452 action of the Stock Yard Company and the various railroad companies centering at Chicago, including the defendants, the general depot for the unloading and loading of live stock at Chicago, and that the defendants hold out to the public the said Union Stock Yards as their live stock depot in that city, and in one way and another their lines of railway connect either directly or indirectly with the platform of the Stock Yard Company of Chicago, where said cattle are loaded and unloaded, and that they have for a long time been accustomed to and do still transport carloads of live stock to the Union Stock Yards; that the defendant carriers handling live stock to or from Chicago, Illinois, have for more than half a century designated the stock yards of the Stock Yard Company of Chicago as their terminal for the receipt and delivery of substantially all carload shipments of live stock handled to and from the City of Chicago; that the live stock hauled to and from the Union Stock Yards of Chicago by the carriers making the line haul has for more than half a century been loaded and unloaded for the carriers by the Stock Yard Company of Chicago, or its employees; that the said carriers have for more than half a century paid the said the Stock Yard Company of Chicago, or its employees, for the use of their loading station, terminals and platforms and the services rendered by them in loading and unloading the said live stock, and for their services in acting as the collecting agents of the carriers named herein, and in collecting the freight charges due to the carriers named herein from members of your petitioner who do business as consignees of and dealers in live stock in and about the stockyards.

VI.

That for many years the tariffs of the Stock Yard Company, which were duly published and filed with the Interstate Commerce Commission, contained the schedule of charges made by that company for the service of loading and unloading live stock at the Union Stock Yards, Chicago, which were as follows:

For loading—50c per car of any capacity;

For unloading—25c per car of any capacity;

that the aforesaid loading and unloading charges were last named and published in the Stock Yard Company's Tariff U. S. Y. & T. Co. No. 2, I. C. C. No. 2, effective June 30, 1913, and which tariff of rates continued in effect until May 21, 1917, when the said terminal charges were increased to the following amounts, as per Stock Yard Company's Tariff, U. S. Y. & T. Co. No. 2, I. C. C. No. 2:

For loading—75c per car of any capacity;

For unloading—50c per car of any capacity;

that the aforesaid tariff having been incorrectly designated with respect to the proper reference numbers, another tariff was issued by said company on April 30, 1917, and effective June 21, 1917, known and designated as U. S. Y. & T. Co. Tariff No. 3, I. C. C. No. 6, which in form and substance read as follows:

"The charge made by this company for the service (as 453 a Carrier's Agent) of loading and unloading Live Stock at the Union Stock Yards, of Chicago, Ill., as follows:

For Loading—75 cents per car of any capacity,

For Unloading—50 cents per car of any capacity."

That thereafter the said Union Stock Yard and Transit Company of Chicago filed its supplement to said last-mentioned tariff, in and by which it proposed to withdraw and cancel said last-mentioned tariff, which said cancellation and withdrawal would, by the terms thereof, have become effective on December 1, 1917, and which said proposed cancellation notice is in words and figures following:

"Effective September 1, 1917, U. S. Y. & T. Co. Tariff No. 3, I. C. C. No. 6, wil be withdrawn and canceled. The loading and unloading platforms of the Union Stock Yard & Transit Company of Chicago will in future be used or available for use by the railways entering Chicago and using them as terminal stations, under operating arrangements."

That in compliance with Investigation and Suspension

Docket No. 1118 of the Interstate Commerce Commission of August 24, 1917, the effective date of Supplement No. 1, U. S. Y. & T. C. Tariff No. 3, I. C. C. No. 6, canceling the said tariff, was postponed by action of the Interstate Commerce Commission until December 30, 1917, and the said tariff ordered to remain in effect during said period of suspension.

That simultaneously with the filing of said notice of cancellation, said Stock Yard Company of Chicago notified each of the common carriers entering the City of Chicago, which are the defendant carriers named in this petition, in words and figures following, to wit:

"Dear Sir:

The Directors of The Union Stock Yard & Transit Company of Chicago have determined to cancel, and have canceled their so-called tariff No. ..... heretofore filed with the Interstate Commerce Commission, and to make a rental charge for the terminal facilities furnished to and used by the lines carrying live stock to and from this market.

The loading and unloading docks and platforms of The Union Stock Yard & Transit Company of Chicago are nothing more or less than the terminals of the lines handling live stock for delivery within this District; and therefore the attempt on the part of the Stock Yard Company to cover the use of these facilities by a tariff, instead of placing the same on an operating basis is and always has been a mistake.

The cancellation notice of the so-called tariff No. ..... becomes effective on the ..... day of ....., 191....., and beginning with that date the U. S. Y. & T. Co. will for the immediate future charge all lines and companies using this company's facilities rental for the use of such facilities, measured by the number of cars handled for the various lines' account, at the rate of 50c for each car delivered into this District, and 75c per car for live stock taken from this District in the cars of carrier lines and loaded or unloaded across this company's docks, platforms and general facilities.

As an incident to the use of the facilities, the Stock Yard Co. will, for those lines which desire to have it do so, 454 continue the actual service of loading and unloading as heretofore, and for the present this service will be included in the rental charge.

Yours truly,

President."

But your petitioner states the fact to be that the defendant carriers determined and agreed among themselves not to pay to the Stock Yard Company of Chicago any sum whatsoever for the use of their terminal facilities, for their unloading docks and platforms, for their services in loading and unloading, and for their services in collecting said tariff bills, but propose to compel your petitioner and the members of your petitioner to pay direct to the Stock Yard Company of Chicago for their services in loading and unloading said cattle.

VII.

That the tariffs published by the defendant carriers or their duly authorized agents and naming rates for the transportation of live stock (of the various kinds the subject matter of this complaint) to and from the Union Stock Yards, Chicago, Illinois, are governed, so far as the Chicago Terminal charges are concerned, by L. A. Lowrey, Agent's Tariff No. 20-J, I. C. C. No. 37 and supplements thereto and reissues thereof, and were so governed prior to this complaint by canceled issues of said Lowrey's tariff.

That all of the defendants other than the Stock Yard Company are parties to or concur in L. A. Lowrey, Agent's Tariff No. 20-J, I. C. C. No. 37, which, on page 72 thereof, provides the basis for rates to and from facilities of the Chicago Junction Railway and for the absorption of the loading, unloading and weighing charges of the Stock Yard Company, by stating that the carriers shown (all of whom are defendants herein) will pay the Stock Yard Company's charges, as follows:

BASIS FOR RATES TO AND FROM FACILITIES OF THE CHICAGO JUNCTION RAILWAY.

To or From the Following Carriers.	Carriers as Shown Will Pay the Union Stock Yards & Transit Co.'s Charges as Follows: Loading Charges. In Cents Per Car.	Unloading Charges. In Cents Per Car.	Weighing Charges. In Cents Per Car. Out-bound.
A. T. & S. F.	50	25	....
B. & O.	50	25	10
B. & O. C. T.	50	25	10
C. & O. of Ind.	50	25	10
C. & A.	50	25	....
C. & E. I.	50	25	....
C. & E.	50	25	10
C. & N. W.	50	25	....
C. B. & Q.	50	25	....
C. C. C. & St. L.	50	25	10
C. G. W.	50	25	....
C. I. & L.	50	25	10
C. M. & St. P.	50	25	....
C. R. I. & P.	50	25	....
C. T. H. & S. E.	50	25	....
G. T.	50	25	10
I. C.	50	25	....
I. H. Belt	50	25	10
M. C.	50	25	10
M. St. P. & S. S. M.	50	25	....
N. Y. C.	50	25	10
N. Y. C. & St. L.	50	25	10
Penna. Co.	50	25	10
P. M.	50	25	10
P. C. C. & St. L.	50	25	10
Wabash	50	25	....

455 VIII.

That the individual tariffs of certain of the defendant carriers contained and now contain similar provisions and schedules and all such tariffs are hereby referred to as though fully set forth herein.

IX.

That for many years the amount of the terminal charges absorbed by the defendant carriers herein exactly correspond with the amounts charged by the Stock Yard Company, but that on May 21, 1917, when the said Company's Tariff No. 2, I. C. C. No. 2, became effective, which increased the loading and unloading charges from 25c and 50c per car, respectively,

to 50c and 75c per car, no corresponding change was made in the aforesaid L. A. Lowrey, Agent's Tariff No. 20-J, I. C. C. No. 37, authorizing the absorption of the said increased charges, although the said tariff of the Stock Yard Company carrying said increased charges provided that:

"The charge made by this company for the service (as a carrier's agent) of loading and unloading live stock at the Union Stock Yards of Chicago, Ill."

and yet certain of the defendant carriers collected from the consignors and consignees shipping from and to said Union Stock Yards, Chicago, the additional 25c per car, which amount was and is being paid under protest pending the determination of the propriety thereof; which additional amount of 25c per car constitutes an increase in all the through rates on live stock to and from Chicago, Ill.

X.

That it being clearly the lawful duty of the defendant common carriers to provide and maintain all adequate and necessary terminal facilities for the receipt and delivery of live stock in the City of Chicago without additional charges, and inasmuch as that fact is recognized by the action of the defendant carriers in absorbing the loading and unloading charges at other live stock markets competing with the Chicago market, where a union terminal for the receipt and delivery of live stock is maintained, the complainant, its members and patrons, are not primarily interested in the amounts charged by the Stock Yard Company to Chicago Lines for the use of their facilities and service, and the question of compensation to the Stock Yard Company is a matter of agreement between itself and its principals. However, the publication and assessment by the Stock Yard Company of this additional charge of 25c per car without a corresponding change in L. A. Lowrey, Agent's Tariff No. 20-J, I. C. C. No. 37, absorbing a similar amount, results in the imposition of charges against the members of the complainant association that are unjust and unreasonable.

456 XI.

That the complainant alleges that the entire question of the amount of compensation and the method of compensating the Stock Yard Company for the performance of the services in

the loading and unloading of live stock at the Union Stock Yards are matters to be adjusted between the Stock Yard Company and the interested Chicago Line, and that therefore the members of the complainant association should not be involved in their controversy or forced to bear the burden thereof; that the entire service should be made the basis of an operating arrangement between the Stock Yard Company and the interested carriers and not the subject matter of published tariff arrangements which involve the shipping public, and that either the proposed tariff of the Stock Yard Company should be allowed to remain in effect and the defendant carriers ordered to amend L. A. Lowrey, Agent's Tariff, whereby said increased charges are absorbed by the interested carriers, or else if the Stock Yard Company is permitted to cancel its aforesaid tariff an order should be issued against the defendant carriers whereby all of their tariffs naming rates on live stock to and from the Union Stock Yards, Chicago, Illinois, will be so amended as to authorize the aforesaid terminal service without additional cost to the shipper above the transportation rates.

XII.

That the defendant carriers are absorbing all loading and unloading charges for all of the cattle and live stock markets of the United States out of their transportation rates.

That the action of the defendant carriers in adding to their transportation rates the additional charge of 25c per car for the loading and unloading service on live stock to and from the Chicago Live Stock Market, located at the Union Stock Yards, Chicago, Illinois, while absorbing such charges at all competing markets, results in an unjust discrimination against complainant's members and patrons and gives to competing markets an undue and unreasonable preference and advantage over the Chicago market which results in much business that was heretofore handled through the Chicago market being diverted to competing markets that are free from such harmful practices of the defendants.

XIII.

That by reason of the facts stated in the foregoing petition compalinant's members and patrons are subjected to the payment of rates and charges for the interstate transportation

aforesaid that are unjust and unreasonable in violation of Section 1, unjustly discriminatory in violation of Section 2, and unduly preferential and prejudicial in violation of
457 Section 3 of the Act to Regulate Commedce aforesaid and results in their direct damage and injury.

Wherefore, complainant, upon belief of itself and its individual members and patrons, prays that the defendant carriers may be severally required to answer the charges herein alleged; and that after due hearing and investigation an order may be made commanding said defendant carriers, and each of them, to cease and desist from the aforesaid violations of said Act to Regulate Commerce and to establish and put in force as maximum for the transportation of live stock between the Union Stock Yards, Chicago, Illinois, and all other points in the United States, the District of Columbia, and adffiacent foreign countries, in lieu of the rates and charges prescribed in the preceding paragraphs, such maximum rates, rules and regulations as the Commission may deem just and reasonable, and to order the defendant carriers to pay to the complainant's members and patrons by way of reparation for the unlawful charges, assessed as hereinbefore alleged, the sum of 25c per car or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that the complainant's members and patrons are entitled to as an award of damages under the provisions of said act for said violations thereof, and that such other or further order or orders be made as the Commission may consider proper in the premises; and that this complaint be consolidated with Investigation and Suspension Docket, No. 1118, involving similar questions and that both proceedings be set down for hearing at the earliest possible date.

THE CHICAGO LIVE STOCK EXCHANGE,
By EVERETT C. BROWN,
Its President.

SIMS, WELCH & GODMAN,
Attorneys for Complainant,
Marquette Building,
Chicago, Ill.

HARRY C. BARNES,
Of Counsel.

458 Mr. Towner: I might add with respect to Defendants' Exhibit 2 that this is the complaint referred to in paragraph 31 of the stipulation, Defendants' Exhibit 1.

I will offer as Defendants' Exhibit 3 the complaint of the

Chicago Live Stock Exchange before the Commission, filed in Docket 12614, that being the complaint that is referred to in paragraph 37 of the stipulation, Defendants' Exhibit 1.

The Court: Any objection?

Mr. Godman: No.

The Court: It may be admitted.

Whereupon said document, marked DEFENDANT'S EXHIBIT 3, was received in evidence, and is in the words and figures as follows, to-wit:

459 BEFORE THE INTERSTATE COMMERCE COMMISSION Defendant hibit 3

I. C. C. Docket, No. 12614.

The Chicago Live Stock Exchange,
Complainant,

vs.

John Barton Payne, Director General,
as Agent, *et al.*,
Defendants.

COMPLAINT.

SIMS, WELCH & GODMAN,
Attorneys.

S. B. STAFFORD,
President.

D. C. MOSIER,
Chairman Transportation Committee.

C. R. HILLYER,
H. R. PARK,
Of Counsel.

808 Marquette Building, Chicago, February 23, 1921.

460 BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket, No. 12614.

The Chicago Live Stock Exchange,
Complainant,

vs.

John Barton Payne, Director General, as Agent; The Atchison, Topeka & Santa Fe Railway Company, The Baltimore & Ohio Railroad Company, Baltimore & Ohio Chicago Terminal Railroad Company, The Chesapeake & Ohio Railway Company of Indiana, The Chicago & Alton Railroad Company, Chicago & Eastern Illinois Railroad Company, and W. J. Jackson, Receiver, Chicago & Erie Railroad Company, Chicago & Northwestern Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railroad Company, Chicago, Indianapolis & Lousville Railway Company, Chicago Junction Railway Company, Chicago, Milwaukee & St. Paul Railway Company, The Chicago, Rock Island & Pacific Railway Company, Chicago, Terre Haute & Southeastern Railway Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Grand Trunk Western Railway Company, Illinois Central Railroad Company, Indiana Harbor Belt Railroad Company, The Michigan Central Railroad Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, New York Central Railroad Company, New York, Chicago & St. Louis Railroad Company, The Pennsylvania Railroad Company, The Pennsylvania Railroad Company, Western Lines, Pere Marquette Railway Company, The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, The Toledo, St. Louis & Western Railroad Company, and J. Frank Johnson and Harry A. Dunn, Receivers, Union Stock Yard & Transit Company, Wabash Railway Company,

Defendants.

461 COMPLAINT.

I.

Now comes the Complainant in the above-entitled proceeding and states:

That the Chicago Live Stock Exchange is an association of persons, firms, and corporations incorporated under the

laws of the State of Illinois; that its membership consists of livestock commission merchants and owners and raisers of cattle engaged in the buying, selling, receiving, and shipping of livestock in interstate and foreign commerce and principally in receiving livestock at the Union Stock Yards for the purpose of being marketed there; that the said association represents every shipper and receiver of livestock at every station in the United States shipping to and from the public livestock market located at the Union Stock Yards in the city of Chicago; that the shipments of livestock, consisting of cattle, calves, swine, sheep, lambs, and goats, are consigned to the individual members of complainant association, or are by them shipped to and between points in the several States and the District of Columbia and between points in the United States and points in foreign countries, and that such shipments in interstate and foreign commerce are made over the lines of the defendant carriers, and that this complaint is brought on behalf of the members of complainant association severally and collectively and on behalf of the owners, consignors, and consignees of shipments of said livestock to and from said Union Stock Yards.

II.

That defendant John Barton Payne, Director General of Railroads, as agent, is an officer of the United States,
462 designated by the President pursuant to the provisions of section 206 of the Transportation Act, 1920; that the railroads and systems of transportation over whose lines or routes the rates, rules, and practices complained of herein applied during federal control were operated by the Director General of Railroads, were all of the railroads above named except the Union Stock Yard and Transit Company; that the defendants above named, other than the Director General, are common carriers engaged in the transportation of property wholly by railroad from points in the various States of the United States to Union Stock Yards, Chicago, and from the Union Stock Yards to numerous points in the various States and to points in foreign countries, and as such common carriers are subject to the provisions of the Interstate Commerce Act, the Federal Control Act, and the Transportation Act.

III.

That complainant filed a complaint with this Commission in the fall of 1917 under Docket No. I. C. C. 9977. It is requested that this complaint be consolidated with docket 9977.

Among the other allegations contained in said complaint it was alleged that effective May 21, 1917, under the Union Stock Yards & Transit Company's tariff, I. C. C. No. 2, the defendants were collecting from the consignors and consignees shipping carloads of livestock to or from the Union Stock Yards, as a loading or unloading charge, 25 cents per carload, which amount was paid under protest pending the determination by this Commission of the lawful character of said charge to the consignors and consignees.

It was further alleged that the exaction from the consignors and consignees of said charge resulted in unlaw-
463 ful and unreasonable and unjustly discriminatory charges.

Said complaint further alleged that the members of said Chicago Live Stock Exchange represent every shipper and receiver of livestock at every station in the United States shipping to and from the Public Live Stock Market located at the Union Stock Yards in the city of Chicago, Illinois; that the collection of said loading and unloading charges from the shippers and consignees, as aforesaid, resulted in their direct damage and injury.

An order was prayed for requiring the defendants to pay to the complainant's members and their patrons, by way of reparation for the unlawful charges assessed, the sum of 25 cents per carload, as an award of damages under the provisions of said act for said violations thereof, upon each carload of livestock unloaded or loaded during the period hereinafter described.

A hearing was held upon said complaint, and also upon the Commission's Investigation and Suspension Docket, No. 1118, which involved similar issues, and a report and decision of the Commission was rendered February 11, 1919.

Upon petition of interested parties the proceeding in I. & S. Docket, No. 1118, and I. C. C. Docket No. 9977, was reopened for further hearing for the purpose of determining, among other things, the amount of the loading and unloading charges, if any, that should be imposed upon shippers of livestock or should be absorbed by the defendants.

The Director General of Railroads, as agent, was duly made a party defendant.

The report of the Commission on further hearing ren-
464 dered June 15, 1920, found, among other things, that the services of loading and unloading are part of the transportation of livestock and the collection of separate charges from shippers for loading and unloading, in addition to the rates on livestock from and to interstate points to and from the stock yards, was an unlawful and unreasonable practice. There was a finding as to reparation made by the Commission as follows:

"We further find that shippers who paid and bore charges for unloading and loading livestock at the stockyards in addition to the rates to and from the stockyards, and who are parties of record herein, have been damaged in the amount of such charges and are entitled to reparation, with interest from the date of such payment. The exact amount of reparation due each shipper cannot be determined on this record, and they should comply with Rule V of the rules of practice."

At the conclusion of the rehearing permission was granted by the Commission to file of record the names of the parties entitled to reparation. A list of names was transmitted to the Commission and the receipt of said list was duly acknowledged by the Commission.

IV.

That the names of the individuals, firms, and corporations, members of the Chicago Live Stock Exchange, are as follows:

Adams & Kitchen.
Adler Sons & Co.
Alexander, Conover & Martin.
Baker, Heyne & Co.
A. Burnett & Co.
Brown, St. John Co.
Bronson & Ettlinger.
Bowles Live Stock Commission Co.
Bunker & Swiney.
Byers Bros. & Co.
John A. Babcock.
Thomas H. Brown.

J. B. Cahill & Co.
Clark Armbrecht & Co.
465 Clay Robinson & Co.
Clark Bowles & Co.
Conklin Bros. Commission Co.
Cochran & Henneberry.
H. D. Copeland & Co.
Cross Sommers & Co.
Central Live Stock Commission Co.
J. R. Clegg & Co.
W. P. Collings & Co.
A. B. Daniels.
J. F. Deutsch & Co.
J. M. Doud & Co.
Drivers Commission Co.
S. S. Driver & Co.
James W. Eastland & Co.
Emmett, Wheeler & Polley.
Evans, Snider, Buel Co.
Filler, Wilson & McClelland.
Freeman Fitzgerald & Co.
Freeland & Godfrey.
Fred Freeman.
Wm. Gentleman & Sons.
Gillogly & Co.
Hansman, Thompson & Ball.
G. H. Hogan & Co.
C. E. Harding & Co.
Hefner Commission Co.
Iowa Live Stock Commission Co.
C. A. Ingwersen.
Ingwersen Bros.
Knettle Bros.
Knollin Sheep Commission Co.
Kuenster Live Stock Commission Co.
Lee Live Stock Commission Co.
F. C. Ludeman.
Marten Bros. & Co.
Mullen Commission Co.
Miller Dolan & Co.
Miller White & Woods.
Maley Carpenter & Co.
Minteer Hubbard & Co.
Murray & McDowell.

McCausland Hoag & Vaughn.
Moog & Greenwald.
J. J. Mahoney.
National Live Stock Commission Co.
Northwestern Live Stock Commission Co.
North American Live Stock Commission Co.
Nixon Horn & Chisholm.
Silas Palmer & Son.
J. Patterson & Son.
Peterson Turnbull & Co.
A. Piatt & Co.
Paris Commission Co.
Pritchard Commission Co.
Rice Bros.
Rosenbaum Bros. & Co.
Roach Live Stock Commission Co.
Abe Russell & Co.
Stafford Bros.
Stephens & Boble.
L. Spencer & Co.
Standard Live Stock Commission Co.
Swanson-Gilmore & Castenholz.
466 Sinclair Gillett & Co.
W. W. Shearer & Co.
Shinn Fry & Co.
W. R. Smith & Son.
Starrett Mathison & Co.
H. M. Saunders.
A. F. Steward & Co.
Sullivan Commission Co.
Harry Sherwood & Son.
W. E. Young & Co.
L. B. Yancey & Co.
L. B. Werden.
Jet Wimp & Co.
Curtis A. Wood & Co.
A. Wainwright.
W. W. Wilson & Co.
Wood Bros.
Walter Bros.
Walters & Dunbar.
G. B. Van Norman & Co.
Van Norman, Lawler & Co.
Trout Live Stock Commission Co.

Tipton Steck & Herrick.
Jas. G. Shutter.
Frank W. Sheldon Commission Co.

467 That said above-named individuals, firms, copartnerships and corporations on their own behalf, as consignees of inbound shipments or as consignors of outbound shipments, or as factors or agents for the consignors of inbound shipments or as factors or agents for the consignees of outbound shipments, paid to defendants each and all of the charges complained of as unlawful, as shown by their books and records, and charged said amounts of payments for loading and unloading in their accounts sales against the consignors and consignees.

V.

There is filed herewith and made a part hereof and marked Appendix A, a list which gives the names of individuals, copartnerships and corporations, the address of each of which is, care of Chicago Live Stock Exchange, Union Stock Yards, Chicago, Ill. This list includes the names of additional shippers not now included in the record, and also the names of shippers already filed of record, and also the names of shippers who made intrastate shipments during the period of Federal control, who, together with the parties named in paragraph II hereof, paid and bore the unreasonable and unlawful charge of 25 cents per carload for loading and unloading livestock at the Union Stock Yards at Chicago; that these charges were paid by the parties named in paragraph II hereof and in said appendix beginning, approximately, May 17, 1917, and extending to aproximately March 1 or April 1, 1920; that the carload shipments of livestock in question were made and were delivered or tendered for delivery or shipment approximately between the dates above named; that the said shipments of livestock originated at various points in the United States and especially throughout the farming regions of the southern and western territories, including the States
468 of Illinois, Indiana, Ohio, Michigan, Wisconsin, Iowa, Missouri, Arkansas, Minnesota, North Dakota, South Dakota, Montana, Idaho, Kansas, Nebraska, Wyoming, Colorado, Oklahoma, Texas, Arizona, New Mexico, Utah, Washington, Canada, West Virginia, Virginia, Kentucky, Tennessee, and were transported by rail to the Union Stock Yards

over the rails of the defendants for a substantial portion of the haul and were delivered at the Union Stock Yards in the trains of said defendants or were tendered for shipment at the Union Stock Yards to defendants for shipment to the States above named and New York, Massachusetts, Rhode Island, Connecticut, Maine, New Jersey, District of Columbia, Maryland, Pennsylvania, Canada; that lists of said shipments have been prepared showing the date of delivery, the car initial and number, the waybill number and date, the originating station, consignor, consignee, route, commodity and amount of reparation claimed; that the exact character of the information contained upon said lists was submitted to the Commission for its approval and the Commission did so approve the exact form and substance of such lists of shipments; that said lists of shipments are now completed and copies have been delivered to the Commission, and copies are now ready for submission to the defendants under Rule V; that the claims in question involve simply the charge which was made by the delivering or originating defendants and the Union Stock Yard & Transit Company, defendant, at the Union Stock Yards; that only this single extra charge to the consignors and consignees for loading and unloading is herein involved, that the facts herein alleged specifically apply as well to shipments from the stock yards and which were loaded at the stock yards and the unlawful charges for loading assessed thereon; and to shipments of livestock unloaded at the Union Stock Yards and the unlawful charges for unloading assessed thereon; that such additional proof as may be required will be made at a further hearing or by stipula-
469 tion or in any manner that may be required; that the amount of the claim in each instance is 25 cents per car both for cars that were loaded and for cars that were unloaded at the Union Stock Yards during the period above named; that because the amount involved consists of this single charge, it is not necessary to give further details with respect to individual shipments.

VI.

That the filing of this complaint is necessary in order to bring before the Commission the shipments made since the date of filing of the original complaint, the date of the second hearing, and the date of the filing of the list of shippers un-

der the Commission's ruling, and the shippers making shipments within the State of Illinois during the entire period of Federal control.

VII.

That by reason of the facts stated in the foregoing paragraphs, the shippers, consignors and consignees of livestock to and from the Union Stock Yards, Chicago, Illinois, shown in Appendix A hereto, and in paragraph II hereof, have been subjected to the payment of charges for loading and unloading livestock at the Union Stock Yards which were when exacted and still are unjust and unreasonable and in violation of section 1 of the Interstate Commerce Act and section 10 of the Federal Control Act, and otherwise unlawful and in violation of section 6 of the Interstate Commerce Act, and unjustly discriminatory and unduly prejudicial in violation of section 3 of the Interstate Commerce Act.

470 Wherefore, on behalf of the members of the Chicago Live Stock Exchange, set forth in paragraph II hereof, who were all consignors or consignees of all of the shipments here involved and as such were the factors and agents of the owners and shippers of said livestock shown in Appendix A and who make claim for the use and benefit of the owners of said livestock who finally paid and bore the unlawful and unreasonable charges complained of; or directly on behalf of the shippers shown in Appendix A;

Complainant prays that defendants be severally required to answer the charges herein; that a further hearing be had if found necessary by the Commission, in order to make further proof of the payment of charges and the bearing of the charges by said shippers; that said defendants be required to pay to the individual firms or corporations members of the Chicago Live Stock Exchange as factors and agents for the use and benefit of the individuals, firms and corporations shown in Appendix A, or directly to said parties shown in Appendix A, by way of reparation for unlawful and unreasonable charges hereinbefore alleged, such sum or sums as in view of the evidence to be adduced herein the Commission shall determine said parties are severally entitled to recover as an award of damages, including interest, under the provisions of said Acts for violations thereof, and that such fur-

ther order or orders be made as the Commission may consider proper in the premises.

SIMS, WELCH & GODMAN,
Attorneys,

S. B. STAFFORD,
President.

D. C. MOSIER,
Chairman Transportation Committee.

C. R. HILLYER,
H. R. PARK,
Of Counsel.

Dated at Marquette Building, Chicago, Ill., February 23, 1921.

471 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 4 an order of the Interstate Commerce Commission, dated April 8, 1922, re-opening Docket 9977 and 12614 for further hearings. That is the one that is referred to in paragraph 38 of the stipulation which was put in as Defendants' Exhibit 1.

The Court: Admit it.

Whereupon said document marked DEFENDANTS' EXHIBIT 4 was received in evidence, and is in the words and figures as follows, to-wit:

472 At a General Session of the Interstate Commerce Commission, held, at its office in Washington, D. C., on the 8th day of April, A. D., 1922.

Defend Hibi

No. 9977

The Chicago Live Stock Exchange

vs.

Atchison, Topeka & Santa Fe Railway Company, *et al.*

No. 12614

The Chicago Live Stock Exchange

vs.

Director General, As Agent
Atchison, Topeka & Santa Fe Railway Company, *et al.*

Upon consideration of the record in Docket 9977, and ap-

plication for further hearing filed on behalf of complainant therein,

It Is Ordered, That this proceeding be and it is hereby reopened for further hearing to afford complainants and intervenors opportunity to offer proof with respect to damage.

It Is Further Ordered, That Docket 9977 be and it is hereby consolidated with Docket 12614, the two cases to be assigned for hearing at a time and place to be hereafter fixed by the Commission; and,

It Is Further Ordered, That a copy of this order be served upon all parties to the above-entitled proceedings.

By the Commission:

GEORGE B. McGINTY,
(Seal) *Secretary.*

473 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 5 a transcript of testimony taken before the Interstate Commerce Commission on November 8, 1917, in investigation and Suspension Docket 1118, that being matter covered by the stipulation Defendants' Exhibit 1.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 5, being a stenographic transcript of testimony taken before the Interstate Commerce Commission on November 8, 1917, in Investigation and Suspension Docket No. 1118, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 5 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

474 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 6 transcript of testimony taken before the Interstate Commerce Commission at Chicago, March 13th to March 16th, both inclusive, 1918, in Docket No. 9977 and Investigation and Suspension Docket No. 1118, this being another volume of the transcript referred to in the stipulation.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 6, being a stenographic transcript of testimony taken before the Interstate Commerce Commission at Chicago March 13th

to March 16th, both inclusive, 1918, in Docket No. 9977 and Investigation and Suspension Docket No. 1118, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 6 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

475 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 7 a transcript of the testimony taken before the Interstate Commerce Commission on May 20th to 22nd, inclusive, 1919, at Chicago, Docket No. 9977, this being another volume of the transcript referred to in the stipulation.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 7, being a stenographic transcript of testimony taken before the Interstate Commerce Commission on May 20th to 22nd, inclusive, 1919, at Chicago, Docket No. 9977, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 7 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

476 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 8 a transcript of the testimony taken before the Interstate Commerce Commission at Chicago on July 14, 1921, in Docket No. 12614. I might add that this is the volume of the transcript that has been heretofore marked Defendants' Exhibit 1, for identification.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 8, being a stenographic transcript of testimony taken before the Interstate Commerce Commission at Chicago on July 14, 1921, in Docket No. 12614, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 8 is, by order of

the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

477 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 9 a transcript of the testimony taken before the Interstate Commerce Commission on October 3rd to 6th, inclusive, 1922, at Chicago, Docket 9977 and 12614, being another volume of the transcript referred to in the stipulation.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 9, being a stenographic transcript of testimony taken before the Interstate Commerce Commission on October 3rd to 6th, inclusive, 1922, at Chicago, in Docket No. 9977 and No. 12614, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 9 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

478 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 10 a transcript of the testimony taken before the Interstate Commerce Commission at Chicago, October 9, 1922, in Docket 9977 and 12614, being another volume of the transcript referred to in the stipulation.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 10, being a stenographic transcript of testimony taken before the Interstate Commerce Commission at Chicago on October 9, 1922, in Docket No. 9977 and No. 12614, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 10 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

479 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 11, transcript of testimony taken at Chicago on

November 6th to November 9th, inclusive, 1922, before the Interstate Commerce Commission, Docket 9977 and 12614, that being another volume of the transcript referred to in the stipulation.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 11, being a stenographic transcript of testimony taken at Chicago on November 6th to November 9th, inclusive, 1922, before the Interstate Commerce Commission, in Docket No. 9977 and No. 12614, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 11 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

480 Mr. Towner: By way of explanation of these exhibits I will say that the stipulation which was put in as Defendants' Exhibit 1, authorized the introduction of not only all the transcript of the testimony taken before the Interstate Commerce Commission, but also all of the exhibits that were offered upon that hearing. In conformity with that stipulation, I will offer as DEFENDANTS' EXHIBIT 12 the documents offered before the Commission at page 139 of the transcript of the hearing on March 13th to March 16th, 1918, known as Mosier's Exhibit No. 1.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 12, being the 52nd annual live stock report of the Union Stock Yards and Transit Company for 1917, a summary for the years 1865 to 1917, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 12 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

481 Mr. Towner: I will next offer as DEFENDANTS' EXHIBIT 13 Hinkle's Exhibit 1 offered in the hearings before the Commission at page 300 of the transcript of hear-

ings March 13th to March 16th, 1918, which is the act of incorporation of the Stock Yards Company.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 13, which is the act of incorporation of the Union Stock Yard and Transit Company of Chicago, one of the defendants herein, and which was offered in the hearings before the Interstate Commerce Commission March 13th to March 16th, 1918, at page 300 of the transcript of testimony taken at said hearing and in said hearing was marked Hinkle's Exhibit 1, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 13 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

482 Mr. Towner: I will offer in evidence as DEFENDANTS' EXHIBIT 14 the document introduced in the hearings before the Commission as Hinkle's Exhibit No. 2, that document being offered at page 302 of the hearing of March 13th, 1918, and is a copy of the minutes of the meeting of the Board of Directors of the Union Stock Yards and Transit Company, held in Chicago March 2, 1865.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 14, being a copy of the minutes of the meeting of the Board of Directors of the Union Stock Yard and Transit Company held in Chicago, March 2, 1865, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 14 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

483 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 15 a copy of the document offered as Hinkle's Exhibit No. 3 at page 303 of the transcript of the hearing before the Commission on March 13, 1918.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 15, being a copy of the minutes of a meeting of the Board of Directors of the Union Stock Yard & Transit Company held on March 4, 1865, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 15 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

484 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 16 the document introduced as Hinkle's Exhibit 4 in the hearing before the Commission at page 304 of the transcript of March 13, 1918.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 16 being a copy of the minutes of a meeting of the Board of Directors of the Union Stock Yard & Transit Company held on January 17, 1866, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendant's Exhibit 16 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

484½ Mr. Towner: I offer as DEFENDANTS' EXHIBIT 17 document which was introduced as Hinkle's Exhibit 5 at page 305 of the transcript of evidence before the Commission on March 13, 1918.

The Court: Admit it.

Mr. Towner: That is a matter of some interest. It is a meeting held in Chicago on October 18, 1867, of the Directors of the Stock Yards Company, at which the loading charge of twenty-five cents and unloading charge of fifty cents per car was first established.

Whereupon said document marked Defendants' Exhibit 17, being a copy of the minutes of a meeting of the Board of Directors of the Union Stock Yards & Transit Company held on October 18, 1867, was received in evidence and is here incorporated in this Bill of Exceptions by reference and

hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 17 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

485 Mr. Towner: I will offer in evidence as DEFENDANTS' EXHIBIT 18 the document which was introduced in the hearings before the Commission as Hinkle's Exhibit No. 6, at page 313 of the transcript of March 13, 1918, which is a copy of the lease of the railroad of the Stock Yards Company to the Chicago and Indiana State Line Railroad, dated December 15, 1897.

Whereupon said document marked Defendant's Exhibit 18, being a copy of the lease of the railroad of the Stock Yards Company to the Chicago and Indiana State Line Railroad, dated December 15, 1897, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 18 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

486 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 19 the document introduced in the hearings before the Commission as Hinkle's Exhibit No. 7 at page 313 of the transcript of the hearing of March 13, 1918, which is an agreement of consolidation between the Chicago, Hammond and Western Railroad Company and the Chicago and Indiana State Line Railroad Company, dated January 1, 1898.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 19, being an agreement of consolidation between the Chicago, Hammond and Western Railroad Company and the Chicago and Indiana State Line Railroad Company, dated January 1, 1898, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 19 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by

the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Cifcuit as an original exhibit in lieu of a copy thereof.

487 Mr. Towner: I will introduced as DEFENDANTS' EXHIBIT NO. 20 the document introduced in the hearings before the Commission as Hinkle's Exhibit 8, at page 314 of the transcript of testimony at the hearing of March 13, 1918, which is a copy of the lease in perpetuity from the Stock Yards Company to the Chicago Junction Railway Company, and covers all of the railroad track owned by the defendant Stock Yards Company, and is dated December 1, 1913.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 20, being a copy of a lease in perpetuity from the Union Stock Yards and Transit Company to the Chicago Junction Railway Company, covering all of the railroad track owned by the Union Stock Yards and Transit Company, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 20 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

488 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT NO. 21 the document introduced in the hearings before the Commission on March 3, 1918, at page 666 of the transcript and there identified as Coffey's Exhibit No. 1, and which is a copy of account sales issued by the National Live Stock Commission Company on some cattle sold on Monday, December 17, 1917.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit No. 21, which is a copy of account sales issued by the National Live Stock Commission Company on cattle sold on Monday, December 17, 1917, and which document was introduced in the hearings before the Interstate Commerce Commission on March 3, 1918, at page 666 of the transcript of the testimony of said hearing as Coffey's Exhibit No. 1, was received in evidence and is here incorporated in this Bill of

Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit No. 21 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

489 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 22 a copy of the document introduced in the hearings before the Interstate Commerce Commission as Coffey's Exhibit No. 2, at page 667 of the transcript of March 13, 1918, which said document is a copy of a Santa Fe waybill showing a great variety of stuff.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 22, which is a copy of a Santa Fe waybill which was introduced in the hearings before the Interstate Commerce Commission as Coffey's Exhibit No. 2, at page 667 of the transcript of March 13, 1918, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 22 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

490 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT NO. 23 a photograph of the loading and unloading of stock at the Stock Yards, which was introduced before the Commission as Park's Exhibit No. 1, upon the hearing of May 20, 1919, at page 855 of that transcript.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit No. 23, being a photograph of the loading and unloading of stock at the Union Stock Yards, and which was introduced before the Interstate Commerce Commission as Park's Exhibit No. 1, upon the hearing of May 20, 1919, page 851 of that transcript, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit No. 23 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the

Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

491 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 24 a copy of the document introduced in the hearings before the Commission as Park's Exhibit No. 2, at page 855 of the transcript taken on May 20, 1919, and which is another photograph of the unloading facilities at the Stock Yards.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 24, being a photograph of the unloading facilities of the Stock Yards, which had been introduced in the hearings before the Interstate Commerce Commission on May 20, 1919, at page 855 of the transcript as Park's Exhibit No. 2, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 24 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

492 Mr. Godman: I understand all of these are being offered on behalf of both defendants.

Mr. Towner: All of these are being offered on behalf of both defendants.

Mr. Towner: I offer as DEFENDANTS' EXHIBIT 25 an airplane picture of the premises of the Union Stock Yards and Transit Company, which was offered in the hearings before the Interstate Commerce Commission at page 870 of the transcript of the hearing of May 20, 1919, and there marked as Park's Exhibit No. 3.

The Court: Admit it. Show the photographs to the jury.

Whereupon said document marked Defendants' Exhibit 25, being an airplane picture of the premises of the Union Stock Yards and Transit Company, which was offered in the hearings before the Interstate Commerce Commission at page 870 of the transcript of the hearing of May 20, 1919, and there marked as Park's Exhibit No. 3, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to

the same extent as though fully set out herein. Said Defendants' Exhibit 25 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

493 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT 26 the document introduced in the hearings before the Interstate Commerce Commission as Park's Exhibit No. 4, at page 877 of the transcript of the hearing of May 20, 1919, which is a blue print showing the unloading docks in good shape.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 26, being a blue print showing the unloading docks in good shape, which was introduced in the hearings before the Interstate Commerce Commission as Park's Exhibit No. 4, at page 871 of the transcript of the hearing of May 20, 1919, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 26 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

494 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT NO. 27 the document introduced before the Commission as Hinkle's Exhibit No. 1, at page 931 of the transcript of the hearing on May 20, 1919, said exhibit being a two-page small map showing the Chicago Junction Railway Company and the connections between the junction and the line-haul carriers into the Yards.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit No. 27, which is a black print map showing the Chicago Junction Railway and the connections between the Chicago Junction Railway and the line-haul carriers into the Union Stock Yards, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit No. 27 is, by or-

der of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

495 Mr. Towner: I will now offer as DEFENDANTS' EXHIBIT 28 the document introduced in the hearings before the Commission as Hinkle's Exhibit No. 2, page 932 of the hearings of May 20, 1919, which is another small scale map showing the Stock Yards Company property and the railroads surrounding it.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 28, being a small scale map showing the Union Stock Yards and Transit Company property and the railroads surrounding it, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 28 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

496 Mr. Towner: I offer as DEFENDANTS' EXHIBIT NO. 29 a document of three pages, which is a statement of the labor cost of loading and unloading live stock at the Stock Yards in 1917 and 1918 and the first three months of 1919, and which was introduced in the hearings before the Commission as Hinkle's Exhibit 3, 4 and 5, page 943 of the transcript of the hearing of May 20, 1919. I might explain that in the hearings before the Commission each page of this document was marked as an exhibit.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit No. 29, which is a statement of the labor cost of loading and unloading live stock at the Stock Yards in 1917 and 1918 and the first three months of 1919, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit No. 29 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of

Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

497 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT NO. 30 the document introduced in the hearings before the Commission as Hinkle's Exhibit No. 6, at page 961 of the transcript of May 20, 1919.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 30, being a copy of a letter dated April 25, 1919 from The Union Stock Yard & Transit Company to Winston Strawn & Shaw, Chicago, reporting result of an inspection made of the Way Bills on stock arriving at Stock Yards April 24, 1919, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 30 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

498 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT NO. 31 the document introduced in the hearings before the Commission as Hinkle's Exhibit No. 7, at page 963 of the transcript of May 20, 1919.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit No. 31, consisting of two pages, being a statement of cars received at the stockyards April 23 to 30, inclusive, 1919, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 31 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

499 Mr. Towner: I will next offer in evidence as DEFENDANTS' EXHIBIT NO. 32 the document introduced in the hearings before the Commission as Hinkle's Exhibit No. 8, at page 1157 of the transcript of hearing of May 20, 1919, which is a statement showing the cost of load-

ing and unloading the live stock at the Stock Yards in Chicago in March of 1919.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 32, being a statement showing the cost of loading and unloading the livestock at the Stock Yards in Chicago in March, 1919, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 32 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

500 Mr. Towner: I will next offer in evidence as DEFENDANTS' EXHIBIT 33 a copy of a document received in the hearings before the Commission as Hinkle's Exhibit No. 9, page 1157 of the transcript of hearing of May 20, 1919, which is a similar statement showing the cost of loading and unloading livestock at the Yards in April, 1919.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 33, being a statement showing the cost of loading and unloading livestock at the Stock Yards in April, 1919, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 33 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

501 Mr. Towner: I will next offer as DEFENDANTS' EXHIBIT 34 two documents introduced in the hearings before the Commission as Park's Exhibits A and B, page 1096 of the hearing of May 20, 1919, which are two bill stubs issued by the Illinois Central Railroad showing the charges on the shipment.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 34, being a photostatic copy of two bill stubs issued by the Illinois Central Railroad showing the charges on the ship-

ment, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 34 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

502 Mr. Towner: I will next offer as DEFENDANTS' EXHIBIT NO. 35 the document introduced in the hearings before the Commission as Beyer's Exhibit No. 1, which exhibit was introduced on May 22nd and is referred to in the transcript of the hearing beginning May 20, 1919. I don't know the exact page. This exhibit is rate advice 901, issued by the United States Railroad Administration on November 25, 1918.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit No. 35, which is a copy of rate advice 901 issued by the United States Railroad Administration on November 25, 1918, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit No. 35 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

503 Mr. Towner: I will next introduce as DEFENDANTS' EXHIBIT 36 a document introduced in the hearing before the Commission as Mosier's Exhibit No. 1. This exhibit was offered and received in the transcript taken on July 14, 1921, in Docket 12614, and purports to be a blank headed "Reparation—Chicago Live Stock Exchange Loading and Unloading Case."

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 36, which is a copy of a blank headed "Reparation, Chicago Live Stock Exchange Loading and Unloading Case," was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Ex-

hibit 36 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

504 Mr. Towner: I will now offer in evidence as DEFENDANTS' EXHIBIT 37 one of the papers contained in the white box over here (indicating). We have already talked about it. Those papers were introduced as Exhibit 1-A, page 44 of the hearing before the Commission held on October 3, 1922. I might add, Your Honor, that that Exhibit 1-A which is contained in that box consists of a good many thousand separate sheets, and I don't know just how it will be marked, but I would suggest, if it is agreeable, that we have the box marked at least.

The Court: I was going to say to mark the box.

Mr. Towner: I think I will ask the reporter to step over to the box and mark it.

The Court: Admit it.

Whereupon said box marked Defendants' Exhibit 37, which is a large pine box, and the contents thereof, consisting of several thousand separates sheets on which are listed the shipments upon which the Commission found that unlawful charges were collected, each shipment being identified in the exhibit by car number, waybill number, date of delivery, originating station, name of consignor and name of consignee, and which was identified as Exhibit 1-A before the Commission, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 37 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

505 Mr. Towner: Now, Your Honor, in the hearings before the Commission held in October, 1922, beginning October 3, 1922, and in November, 1922, beginning on November 6, 1922, the following exhibits were introduced:

Exhibit 2-A at page 99 of the hearing of October 3, 1922;

Exhibit 3-A at page 120 of the hearings of October 3, 1922;

Exhibit 4-A at page 165 of the hearing of October 3, 1922;

Exhibits 5-A, 6-A and 7-A, at page 623 of the hearing of October 3, 1922;

Exhibit 9-A at page 1111 of the hearing of November 6, 1922;

Exhibit 10-A at page 1115 of the hearing of November 6, 1922.

Those exhibits all related to certain claims made by certain packing houses. Those packing houses are not plaintiffs in this suit and it is agreed and has been agreed between counsel that those exhibits offered before the Commission need not be introduced here, for the reason that they have no bearing upon any issue involved in this case, and have nothing whatever to do either with the claim of the plaintiffs or with the defense of the defendants. They were solely statements of the amounts of the claims of these packing houses who are not plaintiffs here. That is agreed to, it is not, Mr. Hillyer?

Mr. Hillyer: That is right.

506 And afterward, to wit, on January 9, 1930, the following proceedings were had:

Mr. Towner: When we concluded yesterday, Your Honor, we had just made an agreement with counsel for the plaintiff with respect to certain exhibits that were offered before the Commission, and were not offered here, for the reason that they did not pertain to any issue involved in this suit. With the agreement of counsel I would like to enlarge that stipulation somewhat. It relates to Exhibits 2-A, 3-A, 4-A, 5-A, 6-A and 7-A, offered on the hearing of October 3, 1922, before the Commission, and Exhibits 9-A and 10-A offered on the hearing of November 6, 1922, before the Commission. The agreement that was made yesterday was that these exhibits were nothing but statements of the amounts of the claims of certain packing companies which had intervened in the proceedings before the Commission, and that they need not be introduced here for the reason that they had no bearing on the issues involved in this case. With the agreement of counsel I would like to enlarge that stipulation so that it may be understood that these exhibits referred to yesterday, and which I have just listed, were also exhibits filed with the Commission, but they had no relation to, and did not pertain in the proceedings before the Commission to any claim made before the Commission by the plaintiffs in this suit and which are involved in the action that we are now trying; is that agreeable, Mr. Hillyer?

Mr. Hillyer: We will agree to that.

Mr. Towner: And Mr. McLaughlin suggests we might add

that these exhibits had no bearing upon any issue involved in this suit, is that your understanding, Mr. Hillyer?

507 Mr. Hillyer: Well, they were part of the claim and that part of the claim has been paid.

Mr. Towner: But they were merely lists of claims; what I mean is, Mr. Hillyer, they have no bearing upon any issue here, in respect to any issue in this case, because their sole pertinency was with respect to the amount of the claims of certain packing companies and those claims are not involved in this case.

Mr. Hillyer: I think we will stand on your original statement, Mr. Towner.

Mr. McLaughlin: I don't know whether that is sufficient or not. The purpose of this stipulation is to avoid putting in this record the exhibits that have no bearing upon any issue to be determined, and I am not quite sure whether that is broad enough or not.

Mr. Towner: We both agreed, that is counsel for the plaintiff and ourselves, have both agreed as to the effect that we desire to produce by the stipulation. Now the effect we desire to produce is that not only do these particular exhibits have nothing to do with the issue in this lawsuit, but that they also had nothing to do with the claims presented by the plaintiff to the Interstate Commerce Commission, that is the claim presented by these plaintiffs to the Interstate Commerce Commission, that is correct, is it not, Mr. Hillyer?

Mr. Hillyer: Yes.

Mr. McLaughlin: That I think is broad enough. The purpose is to try to complete the testimony here for the purpose of the higher court in case we should go there.

508 Mr. Towner: I will offer as DEFENDANTS' EXHIBIT No. 38 the document introduced in the hearings before the Commission as Clark's Exhibit 8-A, offered on page 1049 of the hearing of November 6, 1922.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 38, being a copy of an assignment dated February 23, 1918, from R. B. Bowles to E. A. Clark conveying all of the interest of R. B. Bowles in the firm of Clark Bowles & Co., was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 38 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States

District Court for the Northern District of Illinois to the United State Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

509 Mr. Towner: I will next offer as DEFENDANTS' EXHIBIT 39 a document introduced in the hearings before the Commission as Boothroyd's Exhibit 11-A, page 1150 of the hearing of November 6, 1922, which is a copy of the bill of sale made by C. F. Paris to C. H. Boothroyd Company. There is also the succession of interest with respect to that claim made by him individually.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 39, which is a copy of a Bill of Sale from C. F. Paris to C. H. Boothroyd dated April 7, 1919, conveying all of the interest of C. F. Paris in the Paris Commission Company, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 39 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

510 Mr. Towner: I will next offer as DEFENDANTS' EXHIBIT 40 the document introduced in the hearing before the Commission as Weightman's Exhibit 12-A, offered on page 1163 of the hearing of November 6, 1922, and which is a copy of a letter written by a man named Smith, complaining of the fact that he had to pay this twenty-five cents.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 40, being a copy of a letter dated August 23, 1920, from J. A. Smith, Elmwood, Ill., to "Friend Shute", Chicago, Illinois, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 40 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

511 Mr. Towner: I will next offer as DEFENDANTS' EXHIBIT 41 this bundle which was offered and received

in the hearing before the Commission as Exhibit 13-A, at page 1197 of the hearing of November 6, 1922. I might add by way of explanation that this bundle was attached to the complaint filed in Docket 12614 before the Commission, and purports to contain the names of a multitude of shippers who made shipments to the Stock Yards. I have not read the exhibit; it was designated as Appendix A in that complaint.

Mr. Hillyer: And it was referred to in the body of the complaint and made a part thereof.

Mr. Towner: That, perhaps, is so. The complaint will show and it is in the record. At any rate it was offered in the hearings before the Commission.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit 41, being a bundle of papers containing the names of the shippers who made the shipments to the Stock Yards involved in this case, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 41 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

512 Mr. Towner: I would also like to direct your attention to the fact that at page 1248 of the hearing of November 6, 1922, before the Interstate Commerce Commission, there was offered an exhibit which was there identified as Exhibit 14-A. That exhibit consisted of certain tariffs and tariff settlements filed by the Union Stock Yards and Transit Company with the Interstate Commerce Commission. All of those tariffs, together with some others, are contained in Exhibit 1 attached to the stipulation, which was introduced in evidence in this file as Defendants' Exhibit 1.

Mr. Godman: The same tariffs, Mr. Towner?

Mr. Towner: Yes.

Mr. Godman: They were all offered before the Commission and are attached to the stipulation?

Mr. Towner: All of them were not offered in the hearings before the Commission. The ones we offered before the Commission as 14-A are included in the ones attached to the stipulation, but all of the ones attached to the stipulation were not offered in the hearings before the Commission.

Mr. Towner: I will next offer as DEFENDANTS' EX-

HIBIT 42 a number of documents that were sent to the Interstate Commerce Commission under date of June 2, 1919, and were filed in Docket 9977, pursuant to a request of Commissioner Aitchison, who was conducting the hearings for the Commission, that request appearing at page 1332 of the transcript taken before the Commission on the hearing of May 20, 1919. I have fastened all these documents together, and I will ask that all of them be marked as one exhibit. This Exhibit 42 was filed with the Commission pursuant to a request of Commissioner Aitchison that the parties submit
513 in the record copies of all contracts between the Chicago Junction Railway Company and the line-haul carriers pertaining to the trackage charge made by the Chicago Junction.

The Court: Admit it.

Whereupon said documents marked Defendants' Exhibit 42, being a copy of all contracts between the Chicago Junction Railway Company and the line-haul carriers pertaining to the demurrage charge made by the Chicago Junction, together with a letter of transmittal from the firm of Winston, Strawn & Shaw, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 42 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

514 Mr. Towner: I now offer in evidence as DEFENDANTS' EXHIBIT 43 a statement which was filed with the Commission in Docket 9977 on June 6, 1919, pursuant to authority granted at page 1296 of the transcript of evidence taken before the Commission at the hearing of May 20, 1919. This exhibit is a statement showing the receipts of cars of live stock at the Stock Yards in Chicago between 6:00 P. M. and 6:00 A. M., for the week ending March 8, 1919.

The Court: Admit it.

Whereupon said document marked Defendants' Exhibit No. 43, being a statement showing the receipts of cars of livestock at the Stock Yards in Chicago between 6:00 P. M. and 6:00 A. M. for the week ending March 8, 1919, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit No.

43 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

515 Mr. Towner: I will next offer as DEFENDANTS' EXHIBIT 44 a copy of freight rate authority 2770 issued by the Director General of Railroads and dated November 16, 1918, and in connection with that exhibit I will say that at page 1256 of the hearing of May 20, 1919, before the Commission this document was referred to. The transcript indicates that this docket was offered as an exhibit. The transcript also indicates it was offered as an exhibit and identified as Beyer's Exhibit No. 1. When we secured Beyer's Exhibit No. 1 from the Commission, and it has already been offered in evidence, it was not this docket, but referred to this docket, but in order to clear up any possible misunderstanding we thought we would offer this in evidence if there is no objection.

The Court: Admit it.

Whereupon this document marked Defendants' Exhibit 44 was received in evidence, and is in the words and figures as follows, to wit:

516 November 16, 1918. Defts.'
H File F 25-1686-1.

FREIGHT RATE AUTHORITY No. 2770

Switching charges increased under General Order No. 28.

Mr. D. Campbell, Chairman,
Eastern Freight Traffic Committee,
143 Liberty St., New York City.

Mr. N. B. Wright, Chairman,
Southern Freight Traffic Committee,
Walton Bldg., Atlanta, Ga.

Mr. A. C. Johnson, Chairman,
Western Freight Traffic Committee,
Transportation Bldg., Chicago, Ill.

Gentlemen:

Freight Rate Authority No. 1887 of October 18, 1918, authorized the revision of switching charges for intra-plant, intra-terminal and inter-terminal switching on commodities for which paragraph (a) of Section 2 of Supplement to General Order No. 28 provided increases by specified amounts,

these commodities being named in that Freight Rate Authority.

This will authorize a revision of all other switching charges for intra-plant, intra-terminal and inter-terminal switching on the following basis:

Twenty-five per cent higher than the charges in effect May 25, 1918, subject to a minimum charge of $2.50 per car for intra-plant switching and $5.00 per car for intra-terminal or inter-terminal switching subject to the following Exceptions:

Fractional rule as provided in Section 6 of General Order No. 28 shall be used in applying this authority.

This authority does not apply to switching charges which have been revised under freight rate authorities previously issued, nor to such charges the revision of which has been authorized by previous freight rate authorities, but not yet published.

This authority does not apply to switching charges for services in connection with a line haul, as such charges were not increased by General Order No. 28.

For the purpose of the application of this authority the terms, "intra-plant", "intra-terminal switching" and "inter-terminal switching", are defined as follows:

Intra-plant Switching: A switching movement from one track to another within the same plant or industry.

517 Intra-terminal Switching: A switching movement (other than intra-plant switching) from one track to another of the same road within the switching district.

Inter-terminal Switching: A switching movement from a track of one road to a track of another road when both tracks are within the switching limits of the same station or industrial switching district.

This authority is not to be understood as a permanent or reasonable basis for switching charges, but is issued to bring these charges to the same relative basis as that authorized by Freight Rate Authority No. 1887 for the commodities named therein until such time as an investigation can be made of the proper charges to be assessed at each point for services of this character.

Publish and file with Interstate Commerce Commission on 30 days' notice under Circular No. 1-A of July 1, 1918, and quote Freight Rate Authority as above.

Yours very truly,

(Signed) EDWARD CHAMBERS,
Director, Division of Traffic.

cc—Director Prouty
cc—Mr. Crosland, ICC

Pursuant to due authority, I, as Chief Clerk of the United States Railroad Administration, do hereby certify that the foregoing, consisting of two sheets, is a true copy of "Freight Rate Authority No. 2770, issued by the Director, Division of Traffic, dated November 16, 1918," now a part of the files and records of the Railroad Administration.

Witness my hand and the seal of the United States Railroad Administration this 30th day of December, 1929.

W. B. ROBINSON (Signed)
Chief Clerk, United States Railroad Administration.

(Seal)

518 Mr. Towner: I have one more thing I would like to introduce. Before doing so I would like to say that the exhibits we have introduced here yesterday and today, from Exhibit 5 to Exhibit 44, inclusive, when taken together with the stipulation that was made yesterday and this morning, with respect to certain exhibits, comprises all of the transcript, evidence and exhibits presented to the Interstate Commerce Commission in connection with this case and upon which the order sued on in this case is based.

The Court: That refers to all three numbers of the proceedings before the Commission?

Mr. Towner: All three numbers, I. and S. 1118 and Dockets 9977 and 12614.

I would like to say that where I have referred to the hearings of May 20, 1919, and November 6, 1922, I mean, of course, the hearings beginning on those dates.

I have here, Your Honor, a copy of the rules of practice before the Interstate Commerce Commission, effective during the time involved in the complaints filed in 9977 and 12614, and including also the time involved in the hearing before the Commission, I. and S. Docket 1118. These rules, if Your Honor please, were promulgated by the Commission on March 20, 1916, and were effective from that time up to the close of Federal control. There are certain of those rules I desire to offer in evidence merely by reading them, provided counsel will agree to it, and if they will not we will produce a witness to testify. I thought perhaps we might shorten the procedure a little. Counsel suggests that by agreement we can introduce the whole pamphlet as an exhibit and that is agreeable to us, and under that agreement I will offer the entire booklet as DEFENDANTS' EXHIBIT 45.

519 The Court: Admit it.

Whereupon said document marked Defendants' Exhibit

45, which is a printed pamphlet containing the rules of practice promulgated by the Interstate Commerce Commission on March 20, 1916, was received in evidence and is here incorporated in this Bill of Exceptions by reference and hereby made a part hereof, to the same extent as though fully set out herein. Said Defendants' Exhibit 45 is, by order of the Honorable Charles E. Woodward, Trial Judge, transmitted by the Clerk of the United States District Court for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit as an original exhibit in lieu of a copy thereof.

520 Mr. Hillyer: Will you add that these rules are promulgated by the Commission under Section 17 under the Act Regulating Commerce?

Mr. Towner: Yes, this document which has been marked Defendants' Exhibit 45, as I have stated, is a copy of the rules of practice before the Interstate Commerce Commission, effective March 20, 1916, and remained in effect until March 2, 1920, being the rules of practice before the Commission, promulgated by that body in accordance with the provisions of Section 17 of the Act to Regulate Commerce.

These are all the exhibits I have to offer at this time, and I will yield to Mr. McLaughlin, who wishes to offer evidence in support of certain paragraphs of the stipulation.

Mr. McLaughlin: The defendant, Andrew W. Mellon, Director General of Railroads, as Agent, offers in evidence General Order No. 1, issued by the Director General of Railroads, dated December 29, 1917, and it is published beginning on page 145 of the United States Railroad Administration, Director General of Railroad Bulletin, No. 4, revised, and since that is the only part of the volume we desire to offer, I will read the General Order now.

The Court: Any objection?

Mr. Godman: No objection.

The Court: Admit it.

Thereupon counsel read to the court and jury General Order No. 1, as follows:

521 GENERAL ORDER NO. 1.

Washington, D. C., December 29, 1917.

To all concerned:

Pursuant to the order of the President of the United States, through the Secretary of War, the undersigned, as Director General of Railroads, has taken possession and assumed control of certain transportation systems described in the proclamation of the President, of which proclamation and order officers, agents and employees of said transportation systems are to take immediate and careful notice.

All Employees to Continue.

In addition to the provisions therein contained it is, until further order, directed that—

1. All officers, agents and employees of such transportation system may continue in the performance of their present regular duties, reporting to the same officers as heretofore and on the same terms of employment.

2. Any officer, agent, or employee desiring to retire from his employment shall give the usual and seasonable notice to the proper officer to the end that there may be no interruption or impairment of the transportation service required for the successful conduct of the war and the needs of general commerce.

National Needs Paramount.

3. All transportation systems covered by said proclamation and order shall be operated as a national system of transportation, the common and national needs being in all instances held paramount to any actual or supposed cor-
522 porate advantage. All terminals, ports, locomotives, rolling stock, and other transportation facilities are to be fully utilized to carry out this purpose without regard to ownership.

4. The designation of routes by shippers is to be disregarded when speed and efficiency of transportation service may thus be promoted.

5. Traffic agreements between carriers must not be permitted to interfere with expeditious movements.

6. Through routes which have not heretofore been estab-

lished because of short hauling or other causes are to be established and used whenever expedition and efficiency of traffic will thereby be promoted; and if difficulty is experienced in such through routing notice thereof shall, by carriers or shippers or both, be given at once to the director by wire.

7. Existing schedules or rates and outstanding orders of the Interstate Commerce Commission are to be observed, but any such schedules or rates or orders as may hereafter be found to conflict with the purposes of said proclamation or with this order shall be brought immediately by wire to the attention of the director.

W. G. McAdoo,
Director General of Railroads.

523 Mr. McLaughlin: I might suggest it is the last paragraph we are particularly interested in, in making this offer, as showing that the rates in force by the carriers at the time the Government took charge were continued in effect until a change was made.

THOMAS H. GILLIS, a witness called on behalf of the defendants, having been first duly sworn, was examined in chief by Mr. McLaughlin and testified as follows:

I live in Washington, D. C., and am Assistant Secretary of the Interstate Commerce Commission. I have been employed by the Commission about twenty-two years. For ten years I have been in the Secretary's office, but my previous employment was in a bureau of which the Secretary is the head. That bureau is the Section of Dockets. When I first went to the bureau I kept the docket; later I was made Assistant Chief of the section and conducted most of the correspondence, and had charge of the greater number of the clerks in the section. I became Assistant Secretary about four years ago, and am still active in that capacity. Under the law the Secretary is custodian of the records of the Commission. The dockets and records of the Commission informal and formal investigation and suspension proceedings are in my charge under the direction of the Secretary.

Q. And have you brought the records or any files in the I and S Docket 1118, or I. C. C. No. 9977 and I. C. C. No. 12614, with you, and are they in this court room?

A. Yes, sir.

Q. Have you examined those dockets and records on file to which you have referred?

A. Yes, sir.

524 Q. Do your dockets contain notations in reference to the complaints and amendments to complaints that are filed in these cases, and to the service of those complaints and amendments upon the parties in interest?

A. You mean those records (indicating)?

Q. Yes.

A. They contain the actual docket.

Q. The record you brought here contains the actual docket?

A. Yes, sir.

Q. And the dockets themselves contain notations as to the filing and as to the service, do they not?

A. Yes, sir, but I do not have them with me.

Q. You do not have the dockets with you?

A. No, sir.

I examined the record and found no formal amendment on file in the record; that is, formal amendment to the complaint in Docket 9977 in the record.

Mr. McLaughlin: Will you state whether or not the formal complaint in Docket 9977 was at any time served on the Director General of Railroads?

A. The record does not indicate that it had not been served on the Director General.

Q. And does the record indicate service of any amendment to that complaint on the Director General?

A. No, sir.

Mr. McLaughlin: The docket; does that indicate any service of any amendment to the complaint in Docket 9977 on the Director General?

A. No formal service.

525 *Cross-Examination by Mr. Hillyer.*

Q. Mr. Gillis, did you see in your examination of the bound record of the Commission in this case, did you you come across the order of the Interstate Commerce Commission bringing the Director General in as a party to the case?

Mr. McLaughlin: Now that is objected to.

Mr. Hillyer: He was brought in as a party, was he not?

The Court: Overruled. He may answer.

The Witness: There is an order in the record; I don't recall from memory the date, making the Director General

—providing among other things that the Director General was made a party respondent.

Mr. Godman: That is in 9977?

The Witness: That is in 9977.

The Witness: Yes, and the order also applied to I and S proceedings; the order covered both proceedings, 9977 and 1118.

Mr. Hillyer: Now, Mr. Gillis, have you read the transcript of the record in this case?

A. No, sir.

Q. If the transcript of the record contained any rulings made by the Examiner or the Commissioner in charge of the hearing, with respect to the complaint and issues which might be construed by some of us as amendments to the complaint, you, of course, would have no information about that, if it is contained in the transcript of the record?

A. That is correct.

Mr. Hillyer: That is all.

Mr. McLaughlin: That is all. If the court please, I think that is all of the evidence that I have, but we ought to dispose of, at this time, the objection of the plaintiff to that portion of Defendants' Exhibit 1, the objection that was made
526 yesterday and passed over until today for disposition.

Whereupon the jury was excused and arguments were had by counsel out of the presence of the jury.

Whereupon the following proceedings were had within the presence of the jury:

The Court: The plaintiffs' objection to paragraphs 12 to 25 inclusive of the stipulation marked Defendants' Exhibit 1 is overruled.

To which ruling of the court the plaintiffs by their counsel then and there duly excepted.

The Court: The court will advise the jury that the court has overruled the objection of the plaintiffs to the admissibility of Sections 12 to 25, both inclusive, of the stipulation, and those sections will now be read to you by counsel for the Director General.

Mr. McLaughlin: I will read these Sections 12 to 25, both inclusive, which have not been read to the jury.

Whereupon counsel read to the jury paragraphs 12 to 25, which are a part of Defendants' Exhibit 1 and are as follows:

Defts. (12) That prior to the said period of Federal control of Railroads, R. N. Collyer, as the duly authorized and appointed agent of the line-haul carriers, engaged in the transportation

of livestock between the said Union Stock Yards and points east of Chicago, Illinois, published his official Classification No. 44, providing general regulations, form of contract, and terms and conditions for said transportation by said line-
527 haul carriers, which was duly filed with the Interstate Commerce Commission under I. C. C. O. C. No. 44 and became effective February 1, 1917.

(13) That at noon, December 28, 1917, the Director General of Railroads took over the lines of railroads of the said line-haul carriers which engaged in the transportation of live stock between the said Union Stock Yards and points
528 east of Chicago, Illinois, and continued in effect the said Official Classification No. 44.

(14) That during the said period of Federal control of railroads the Director General of Railroads published two supplements to said Official Classification No. 44, which in form and substance carried forward and continued in force during the said period of Federal control of railroads, except as hereinafter indicated, the general regulations, form of contract, and terms and conditions for the transportation of live stock between the said Union Stock Yards and points east of Chicago, Illinois, as contained in said Official Classification which supplements were filed with the Interstate Commerce Commission under I. C. C. Nos. 20 and 29, and became effective January 1, 1918, and September 30, 1918, respectively.

(15) That copies of the pages of said Official Classification No. 44, viz., title page, and pages xxi, lxiii, lxiv, 1, 30, 48, 49, 220, 221, 222, 223 and 224; of title page and pages 3, 4 and 5 of said supplement No. 20 thereto; and of title page and pages 17, 18 and 19 of said Supplement No. 29 thereto, which have been duly certified by George B. McGinty, Secretary of the Interstate Commerce Commission, are attached hereto, made a part hereof, and numbered Exhibit 3.

(16) That prior to the said period of Federal control of railroads, R. C. Fyfe, as the duly authorized and appointed agent of the line-haul carriers, engaged in the transportation of live stock to the said Union Stock Yards from points west of Chicago, Illinois, published his Western Classification No. 54, providing certain regulations, and terms and conditions for the said transportation by said line-haul carriers, which was duly filed with the Interstate Commerce Commission under I. C. C. No. 12 and became effective September 1, 1916.

529 (17) That at noon December 28, 1917, the Director General of Railroads took over the lines of railroads en-

gaged in the transportation of live stock to the said Union Stock Yards from points west of Chicago, Illinois, and continued in effect the said Western Classification No. 54.

(18) That copies of the pages of said Western Classification No. 54, viz., title page and pages i, lix and 249, which have been duly certified by George B. McGinty, Secretary of the Interstate Commerce Commission, are attached hereto, made a part hereof, and numbered Exhibit 4.

(19) That during the said period of Federal control of railroads the Director General of Railroads published Western Classification No. 55, and Supplement No. 1 thereto, which in form and substance carried forward and continued in force during the said period of Federal control of railroads, except as hereinafter indicated, certain regulations and terms and conditions for the transportation of live stock to the said Union Stock Yards from points west of Chicago, Illinois, as contained in Western Classification No. 54, which classification and Supplement No. 1 were duly filed with the Interstate Commerce Commission under I. C. C. No. 13 and Supplement No. 1, and became effective April 1, 1918, and April 20, 1918, respectively.

(20) That copies of the pages of said Western Classification No. 55, viz., title page, and pages i, xiii, lxi, and 282, and of title page and pages 4 and 21 of said Supplement 1 thereto, which have been duly certified by George B. McGinty, Secretary of the Interstate Commerce Commission, are attached hereto, made a part hereof, and numbered Exhibit 5.

530 (21) That during the period of Federal control of railroads the Director General of Railroads published Consolidated Freight Classification No. 1, consolidating and superseding the aforementioned Official Classification No. 44, and Western Classification No. 55, and containing in form and substance certain regulations, form of contract, and terms and conditions for the transportation of live stock between the said Union Stock Yards and points east of Chicago, Illinois, as contained in Official Classification No. 44; and also containing in form and substance certain regulations and terms and conditions for the transportation of live stock to the said Union Stock Yards from points west of Chicago, Illinois, as contained in said Western Classification No. 55, which Freight Classification No. 1 was duly filed with the Interstate Commerce Commission under I. C. C.—O. C. No. 45 and I. C. C. No. 14, and became effective December 30, 1919, and continued in full force and effect during the remainder of said period of Federal control of railroads.

(22) That copies of the pages of said Consolidated Freight Classification No. 1, viz., title page and pages ii, xxxv, lxxxix, 47, 48, 240 and 250, which have been duly certified by George B. McGinty, Secretary of the Interstate Commerce Commission, are attached hereto, made a part hereof, and numbered Exhibit 6.

(23) That prior to the said period of Federal control of railroads, E. B. Boyd, as the duly authorized and appointed agent of the line-haul carriers engaged in the transportation of live stock between the said Union Stock Yards and points within the State of Illinois, published his Illinois Classification No. 10-B, providing certain regulations and terms and conditions for said transportation by said line-haul car-
531 riers, which Illinois Classification was filed with the Interstate Commerce Commission under I. C. C. No. A-658, and became effective May 25, 1916.

(24) That at noon December 28, 1917, the Director General of Railroads took over the lines of railroads of said line-haul carriers which engaged in the transportation of live stock between the said Union Stock Yards and points within the State of Illinois, and continued in effect the said Illinois Classification I. C. C. No. A-658.

(25) That copies of the pages of said Illinois Classification I. C. C. No. A-658, viz., title page and pages iii, iv and 5, which have been duly certified by George B. McGinty, Secretary of the Interstate Commerce Commission, are attached hereto, made a part hereof, and numbered Exhibit 7.

The exhibits referred to in the foregoing paragraphs 15, 18, 20, 22 and 25 are attached to and made a part of Defendants' Exhibit 1 which has been heretofore incorporated herein by reference and is transmitted as an original exhibit.

532 Mr. McLaughlin: The Director General of Railroads rests.

Mr. Towner: And the Stock Yards Company does likewise.

Mr. Godman: If the court please, subject to the reservation which was made earlier in this case, in respect to testimony pertaining to attorney's fees, which Mr. McLaughlin and Mr. Towner have agreed they will stipulate in writing may be taken, if necessity for it should arise before Your Honor, and without the intervention of the jury, after a not so very thorough examination of law, but all the law seems to be persuasive that there is the course to follow in case of the presentation of these attorney's fees and with that reser-

vation, and also with the understanding I have arrived at with Mr. McLaughlin, representing the Director General, and Mr. Towner, representing the Stock Yards Company, that we may take the figures shown in Exhibit 4 and compile the amount there shown to have been ordered as reparations, I will submit it to these gentlemen, and that the statement, if verified by them and agreed to may go into evidence as an exhibit, or the result stated with the same effec as though it had been sworn to by a witness. Is that correct?

Mr. Towner: Yes.

Mr. McLaughlin: So that there will be no misunderstanding, these amounts in some instances are considerably in excess of the amount the witness testified had been paid of the charges. We were precluded from going back to the witnesses' testimony. We are not admitting these amounts are correct, but they are the amounts shown in Exhibit 4, and allowed by the Commission.

533 Mr. Godman: With that understanding we will rest.

Which was all of the evidence offered and received on the part of plaintiffs and defendants upon the trial of this cause.

And thereafter the following proceedings were had before the court out of the presence of the jury:

Mr. Towner: If Your Honor please, the case having been closed, with the reservations made by Mr. Godman, on behalf of the Stock Yards Company, the defendant, I wish to present a motion for a directed verdict.

In connection with that motion I would like to say this, Your Honor: Of course, the practice in this court is supposed to conform to the practice in the State courts, so far as it may. Due to the nature of this case, however, I have departed somewhat from that form in that I have specified in the motion the grounds upon which the defendant Stock Yards Company relies in presenting the motion. In addition I have reserved, in the final paragraph, the right, in the event that the motion be denied, to have the case submitted to the jury upon the special charges requested by my client, and any other charges given by the court on such questions of fact as might properly be submitted to the jury.

Mr. McLaughlin: If the court please, on behalf of Andrew W. Mellon, Director General of Railroads, as Agent, the defendant in this suit, I wish to present a motion requesting

534 the court to direct the jury to return a verdict for the Director General as Agent, and in doing so I have followed

the method suggested by Mr. Towner, which I hope will be regarded as a proper and sufficient method of presenting such a motion, notwithstanding it is somewhat different from the practice in the State court.

This suit is a rather unusual one, in a sense it is a special proceeding, but it is also a kind of a law action, and if there is any question about the propriety of this form of motion, I would like to have Your Honor, or counsel, suggest; and if there is no suggestion to the contrary, I will assume it is satisfactory, even though it may not be in strict compliance with the usual practice.

The Court: You can enter your motion and if there is any objection to it I will hear the objection as to the form.

Mr. Godman: I have not had an opportunity of examining these motions; I don't know that I will have any objection. I will say this: If there is any technical imperfection in it by which counsel feels he might lose, I will consent that he can remedy that by putting it in proper form later.

Mr. McLaughlin: I might suggest that the same reservation of the right to go to the jury in the event the motion is overruled is contained in the motion.

Mr. Towner: There is one thing more I would like to say in connection with these motions, and that is this: To a rather considerable extent the motion of the Stock Yards Company and the motion of the Director General rests upon the same grounds. It is not our intention, and I think I can speak for Mr. McLaughlin in this respect, to have both of us argue the same points. There will be some deviation on that, and with reference to this point—

The Court: Up to a certain point, as I understand your pleadings, you go together.

535 Mr. Towner: Exactly. And to that extent there will only be one argument presented on both motions, because there is no point in having Mr. McLaughlin and Mr. Andrews make an extended argument on a point and have me reiterate it where we are together on the thing and where it affects us both equally.

Thereupon the motions of the said defendants for a directed verdict were presented and filed, and are in the words and figures following, to-wit:

536 • • (Caption) • •

MOTION OF DEFENDANT, UNION STOCK YARD & TRANSIT COMPANY, FOR A DIRECTED VERDICT.

All parties having rested and the evidence being closed, defendant Union Stock Yard & Transit Company of Chicago now moves the Court to direct the jury to return a verdict in its favor and against all of the plaintiffs, on the following grounds:

1. The complaint in Docket 9977 before the Interstate Commerce Commission did not pray for the payment of reparation by this defendant to any of the plaintiffs herein, and the evidence is insufficient to sustain any award of reparation against said defendant and to said plaintiffs in Docket 12614 before the said Commission.

2. Said defendant in any event is not liable to plaintiffs upon any shipments which moved prior to February 25, 1919, and the record is insufficient to sustain any award against said defendant and in favor of plaintiffs on shipments moving subsequent to said date.

3. The award and order of the Interstate Commerce Commission sued on in this case is void because the Inter-
537 state Commerce Commission in making such award and order went outside the record made before it and considered substantial evidence not in said record.

4. The evidence is insufficient to support or sustain the award and order of the Interstate Commerce Commission sued on in this case.

5. The evidence in this case shows that said defendant in loading and unloading live stock at the Union Stock Yards, Chicago, Illinois, during all of the time involved in this case was not performing a common carrier service, and that with respect to such service the Interstate Commerce Commission had no jurisdiction.

6. The evidence in this case shows that all of the charges referred to in the award and order of the Interstate Commerce Commission sued on and involved in this case were not paid to this defendant, but to the Director General of Railroads, and that the only charges received by said defendant during the period involved in this case for loading and unloading live stock were charges authorized by this defendant's tariffs then on file with the Interstate Commerce

Commission, and which had been approved by said Commission.

7. The evidence in this case is insufficient to show the amount, if any, paid on account of the loading and unloading charges in controversy and received by this defendant.

8. The evidence in this case is insufficient to show the amount of the liability, if any, existing in behalf of any plaintiff in this suit and against this defendant.

9. The evidence in this case shows that the evidence offered and received in the various hearings before the Interstate Commerce Commission in the proceedings in which the order and award sued on was made, was insufficient to justify or support such order.

538 10. The order and award of the Interstate Commerce Commission sued on herein operates to confiscate the property of this defendant, in violation of its constitutional rights.

11. The order and award of the Interstate Commerce Commission sued on herein is contradictory to and in violation of the previous finding of the Commission that the duty to load and unload live stock at the Union Stock Yards, Chicago, rested upon the carriers hauling such stock to and from said market, and has the effect of imposing such duty upon this defendant.

12. The evidence in this case shows affirmatively that the plaintiffs in this suit do not have any interest or right sufficient to entitled them or any of them to maintain this suit or any suit to recover the charges sued for herein.

13. The evidence is insufficient to show a liability on the part of this defendant to any plaintiff in this suit in any amount.

14. The evidence is insufficient to show that plaintiffs or any of them have been damaged in any amount by the collection of the charges herein sued for.

15. The evidence shows that the plaintiffs and each of them do not have any right or title to any claim that may have arisen on account of the collection of the charges in controversy, and are without any right or authority to maintain this suit, and were without any right or authority to make complaint in their own names before the Interstate Commerce Commission on account of the collection of such charges, and the awarding of reparation to plaintiffs by said Commission was erroneous and contrary to law.

16. The evidence is insufficient to show or support the

finding of the Interstate Commerce Commission that the docks and chutes of this defendant are or were its terminals used in the transportation of live stock.

539 17. The Interstate Commerce Commission did not acquire or have jurisdiction to enter the order sued on against this defendant, and said order furnishes no basis for a recovery against this deefndant in this suit.

18. Under all of the evidence introduced in this cause no verdict against this defendant, if returned by the jury, could be permitted to stand, but must be set aside by the court.

In presenting this motion this defendant reserves the right, in the event this motion be denied, to have this case submitted to the jury upon special charges requested by it, and upon such other legal and proper charges as the Court may give.

WINSTON, STRAWN & SHAW,
Attorneys for Defendant Union Stock Yard & Transit Company of Chicago.

540 * * (Caption) * *

MOTION OF ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS AS AGENT, FOR A DIRECTED VERDICT.

All parties having rested and the evidence being closed, defendant, Andrew W. Mellon, Director General of Railroads as Agent, etc., now moves the Court to direct the jury to return a verdict in his favor and against all of the plaintiffs, and urges as grounds therefor the following:

1. The evidence is insufficient to support or sustain the order of the Interstate Commerce Commission sued on in this case.

2. The evidence in this case shows that the consent of Congress for the bringing and filing of complaints before the Interstate Commerce Commission and against the agent appointed by the President, pursuant to Section 206-A, Transportation Act 1920, was not complied with, and that the Interstate Commerce Commission acquired and had no jurisdiction to make the order and award sued on as against this defendant.

3. The evidence in this case shows that the Union Stock-

yards & Transit Company was, during all of the time complained of in this suit, a common carrier, and that it received the livestock, for the unloading of which the charges in controversy were assessed and collected, from the railroads being operated by the Director General of Railroads, un-
541 der Federal Control, as a connecting carrier; that it unloaded such livestock as such connecting carrier and delivered same after unloading to the consignees entitled to receive the same; that the charge collected for such unloading was provided for in its tariffs on file with the Interstate Commerce Commission and the said Union Stockyards & Transit Company collected said charges and received the benefits thereof.

4. The evidence before the Interstate Commerce Commission and in this case was and is insufficient to support the finding of the Commission that the collection of separate charges from the shippers for unloading and loading live stock in addition to the line haul rates on live stock, was an unlawful and unreasonable practice, but on the contrary such evidence shows the collection of such separate charges was both reasonable and lawful and the duty of the Union Stockyards & Transit Company.

5. The loading and unloading of live stock in carload lots was a part of the transportation of said live stock from point of origin to destination and was a service for which the shipper or consignee was obliged to compensate the carrier performing the same. Such service was performed by the Union Stockyards & Transit Company and the tariffs of the line haul carriers delivering the said live stock to the Union Stockyards & Transit Company provided for absorbing or paying 25c for unloading and 50c for loading each carload of live stock at the Union Stockyards, Chicago. To the extent the charges of the said Union Stockyards & Transit Company for performing such service were not within the absorption provisions of the line haul carriers, same were properly collectible from the shipper or consignee and being in a lawfully published tariff the Union Stockyards & Transit Company was bound to make such collection.

542 6. The evidence in this case is insufficient to show that the Director General of Railroads collected or received any of the money paid to the Union Stockyards & Transit Company on account of the loading and unloading charge in dispute.

7. The evidence in this case is insufficient to show the

amount, if anything, paid on account of the loading and unloading charges in controversy, received by the Director General.

8. The evidence in this case is insufficient to show the amount of liability if any existing in behalf of any plaintiff in this suit and against defendant, Andrew W. Mellon, Director General of Railroads as agent.

9. The evidence in this case shows that the evidence offered, introduced and received in the various hearings before the Interstate Commerce Commission in the proceedings in which the order sued on was made was insufficient to justify or support such order.

10. The evidence offered, introduced and received before the Interstate Commerce Commission, in the proceedings in which the order sued on was entered, was insufficient to support the Commission's finding and conclusion that the loading and unloading of livestock at the Union Stockyards, Chicago, was a duty that should be performed by the carriers without making a separate charge therefor.

11. The evidence in this case shows affirmatively and conclusively that plaintiffs received the livestock, on account of which the charges involved in this suit were assessed and collected, as commissionmen or agents of the various persons, firms and corporations who shipped the same, as consignees, for purposes of sale, in consideration of the payment of a commission and the said plaintiffs sold said livestock as such commissionmen and agents of the shippers and paid the charges in controversy, from the shippers' own funds,
543 before remitting the net proceeds of the sale thereof and shows that the said plaintiffs do not have such interest or right as will entitle them or any of them to maintain suit to recover such charges in any event.

12. The evidence is insufficient to show such interest in plaintiffs or any of them as will permit of recovery herein on the part of any plaintiff as against this defendant.

13. Under all the evidence in this case, the fact of the agent of the linehaul carriers inserting the unloading charge in the waybill stub, which constituted the bill presented by the Union Stockyards & Transit Company to the consignees, covering freight and terminal charges, will not justify a finding that the Director General participated in the collection of such charges or that he received the benefit of the collection thereof, nor will such fact justify a verdict against this defendant.

14. The charge complained of in this suit, while the tariff of the Union Stockyards & Transit Company providing therefor, was in effect and to the extent that the tariffs of the linehaul carriers made no provisions for its absorption, was a charge the Union Stockyards & Transit Company was bound to collect from the consignor or consignee of the livestock involved and the fact that the agent of the linehaul carriers, in making up the bill to be presented by the Union Stockyards & Transit Company for freight and terminal charges, inserted or included such charge as a separate item therein will not justify or sustain a verdict against this defendant.

15. The evidence is insufficient to show a liability on the part of this defendant in favor of any plaintiff in this suit in any amount.

16. The evidence is insufficient to show that plaintiffs or any of them have been damaged in any amount by the collection of the charges in controversy.

17. The evidence affirmatively shows that plaintiffs and each of them are without any right or title to any claim that may have arisen on account of the collection of the 544 charges in controversy and are without any right or authority to maintain this suit and were without any right or authority to make complaint in their own names before the Interstate Commerce Commission on account of the collection of such charges, and the awarding of reparation to plaintiffs by the Interstate Commerce Commission was erroneous and contrary to law.

18. The evidence is insufficient to show or support the finding of the Interstate Commerce Commission that the docks and chutes of the Union Stockyards & Transit Company are or were the terminals of the railroad carriers but, on the contrary, affirmatively shows that such docks and chutes were the property of the Union Stockyards & Transit Company, used, maintained and operated by it in the performance of its duties and services as a common carrier of livestock.

19. The evidence in this case affirmatively shows that the docks, chutes and loading pens and stockyards used, maintained and operated by the Union Stockyards & Transit Company, constituted the property devoted to public use and employed in conducting the business of the Union Stockyards & Transit Company, as a common carrier and as a connecting carrier of the railroad carriers transporting livestock

thereto and therefrom, and same were not the terminals of such railroad carriers and were no part of the facilities of such railroad carriers, and the services performed in the operation and use thereof was not a service included in the transportation furnished by such railroad carriers, under and pursuant to their tariffs on file with the Interstate Commerce Commission.

20. The evidence shows that compensation for the service of loading and unloading livestock transported by the railroad carriers involved in this suit, to the Union Stockyards, Chicago, was included in the linehaul rate and terminal charge in the amount of 50c for loading and 25c for unloading each carload of such livestock, and the additional charge of 25c contained in the tariff of the Union Stockyards &
545 Transit Company effective May 21, 1917, was not included therein.

21. The place of delivery of the livestock in controversy was off of the lines of the railroad carriers operated by the Director General of Railroads under Federal Control and involved in this suit, and the service of loading and unloading such livestock was performed by a common carrier on whose property delivery was required to be made. There is no evidence in this case justifying a finding that the said railroad carriers should assume and pay any portion of such common carrier's charges for the services it performed, in excess of the amounts provided for in their tariffs on file with the Interstate Commerce Commission.

22. The tariffs and livestock contracts of the railroad carriers, operated by the Director General of Railroads under Federal Control, and involved in this suit, provided that the rates were made in respect to the duty of the shipper or consignee to load and unload the same. The shippers and consignees were relieved of such burden at Union Stockyards, Chicago, in the sum of 50c for loading and 25c for unloading each carload of livestock, by reason of the absorption provisions of the railroad carriers tariffs to that effect, but the remainder of such burden rested and remained on the shipper and consignee

23. The Interstate Commerce Commission did not acquire or have jurisdiction to enter the order sued on against this defendant, and the pretended order furnishes no basis for a recovery against this defendant in this suit.

24. Under all of the evidence introduced in this cause, no verdict against this defendant, if returned by the jury, could

be permitted to stand but must be set aside by the Court.
546 In presenting this motion, defendant reserves the right, in the event this motion be denied, to have this case submitted to the jury upon the special charges requested by him, and upon such other legal and proper charges as the court may give.

EDGAR R. HART
SIDNEY F. ANDREWS
A. A. MCLAUGHLIN
Attorneys for Defendant, Andrew W. Mellon, Director General of Railroads as Agent.

547 And afterwards, to-wit, on January 28, 1930, the following proceedings were had before the court and jury:

The Court: Gentlemen, the court has had under advisement for sometime the motion made at the conclusion of all the evidence by the Union Stock Yards and Transit Company and the Director General, as Agent, respectively, for a directed verdict. What the court has to say upon that motion has been reduced to writing and I will read it.

Thereupon the court read its opinion on the motion of the defendants for a directed verdict, and the same was filed in this cause, and appears in the record proper and reference to which is hereby made.

Thereupon the ruling of the court was that the mtoions to direct a verdict made by the defendant Andrew W. Mellon, Director General, as Agent, etc., and a similar motion made by the Union Stock Yards and Transit Company, defendants, be, and each of them were, allowed.

Mr. Godman: May I have an exception to the ruling?

The Court: Yes.

Mr. Godman: On both motions?

The Court: Yes, exception to the ruling of the court.

To which action of the court in allowing said motions the plaintiffs, and each of them by their counsel, then and there duly excepted.

Mr. Godman: I presume when Your Honor directs a verdict judgment will be entered, and I desire to pray an appeal at that time.

The Court: Yes, that will be allowed. Is there any particular form you want these directions to take?

548 Mr. Towner: We have spoken some about that, and I was inclined to think, my own view was, subject to cor-

rection, that just a verdict by the jury, finding the issues, or a direction to the jury to enter a verdict finding the issues in favor of the defendant, would be sufficient.

Mr. McLaughlin: A verdict finding the issues against all the plaintiffs in favor of both defendants I think would be sufficient.

The Court: I will ask you gentlemen to do this: I will take a recess for a few minutes and you can prepare the form you wish.

After recess the following proceedings were had:

The Court: Gentlemen of the jury, the court instructs the jury to find the issues for the defendants and to return into court the verdict which will be submitted to you. Each juror will sign the verdict as it is delivered to him. The verdict is: At the direction of the court we find the issues against the plaintiffs and in favor of the defendants.

Mr. Godman: May we have an exception, Your Honor, to the direction of the verdict?

The Court: An exception to the ruling, an exception to the instruction and an exception to the verdict.

To which action of the court in so instructing the jury the plaintiff, and each of them, by their counsel then and there duly excepted.

And thereupon the following verdict was returned by the jury and read by the Clerk:

At the direction of the court, we the jury find the issues against the plaintiffs and in favor of the defendants.

549 To which verdict of the jury the plaintiffs, and each of them, by their counsel, then and there duly excepted.

Mr. Godman: I will make a formal motion for a new trial.

The Court: Motion for a new trial entered and the motion is overruled.

Mr. Godman: And exception?

The Court: Yes.

To which ruling of the court the plaintiffs, and each of them, by their counsel, then and there duly excepted.

Mr. Godman Motion in arrest of judgment.

The Court: Motion in arrest of judgment entered and overruled.

Mr. Godman: And an exception on the part of each and all the plaintiffs?

The Court: Yes.

To which ruling of the court the plaintiffs, and each of them, by their counsel, then and there duly excepted.

The Court: Judgment on the verdict; judgment in favor of the defendants against the plaintiffs for costs.

Mr. Godman: And from the judgment we will pray an appeal or writ of error, whichever is the proper practice. I think either will be proper.

The Court: Prayer of appeal allowed.

Mr. Godman: Ninety days for Bill of Exceptions?

The Court: As long as you want.

Mr. Godman: Ninety days.

The Court: Ninety days for a Bill of Exceptions.

Mr. Godman: I presume all we need will be a cost bond.

550 The Court: Cost bond is enough.

Mr. Godman: About $250.00 would be sufficient, I think?

The Court: Make the bond $500.00.

Mr. Towner: Judgment on the verdict, Your Honor.

The Court: Judgment on the verdict.

And afterwards, to-wit; on January 31, 1930, being one of the regular days of the December, A. D. 1929 Term of said court, came the plaintiffs, by their counsel, and presented and filed their motion to vacate the orders of said court of January 28, 1930, and presented and filed affidavits in support thereof, said motion and affidavits being in the words and figures as follows, to-wit:

551 * * (Caption) * *

Now come the plaintiffs in the above-entitled case, by their attorneys, Sims Godman & Stransky, and move the court to vacate and set aside the following orders and judgment entered and appearing of record in this case on Tuesday, January 28, 1930:

Order denying and overruling plaintiffs' motion for a new trial;

Order overruling and denying plaintiffs' motion in arrest of judgment;

Judgment on the verdict in favor of defendants and against plaintiffs and against plaintiffs for costs;

Orders allowing appeal, fixing time for bill of exceptions and amount of cost bond.

Plaintiffs by their said attorneys further respectfully request the court to enter this motion and set the same down for hearing and argument on some future date convenient to the court.

In support of said motion there is presented and filed herewith the affidavits of Elwood G. Godman, Esq., and Clair R. Hillyer, Esq.

SIMS GODMAN & STRANSKY
Attorneys for plaintiffs.

552 • • (Caption) • •

State om Illinois }
County of Cook. } ss.

ELWOOD G. GODMAN, being duly sworn, on oath, deposes and says:

I am a practicing lawyer in Chicago, Illinois and a member of the firm of Sims Godman & Stransky, attorneys at law, and one of the attorneys for the plaintiffs in the above-entitled case and in association with Clair R. Hillyer, Esq., conducted the trial of the above-entitled case before the District Court of the United States, for the Eastern Division of the Northern District of Illinois, His Honor, Judge Woodward, presiding, and in which case on January 28, 1930, at the direction of the court, the jury returned a verdict in favor of the defendants and against the plaintiffs in said case. That immediately upon the return of the verdict by the jury as aforesaid, a motion for a new trial was made and without argument thereon overruled and a motion in arrest of judgment then made and without argument thereon overruled and exceptions duly taken and allowed to the action of the court in so overruling said motions, and judgment was rendered by the court upon the verdict and for costs against the plaintiffs. A lengthy writ-
553 ten opinion was rendered by the court immediately prior to directing the jury to return a verdict as aforesaid in favor of the defendants and at the time when the motion for a new trial was made there was not sufficient time in which to digest and analyze the lengthy opinion thus rendered to

enable counsel to properly present and argue the grounds existing in support of said motion for a new trial. The case involves very important principles of law and the decision of the court denies to the plaintiffs the right which they assert to recover from the defendants a large amount of money, towit, in excess of Two Hundred Thousand Dollars ($200,000), which amount had been awarded to them by the Interstate Commerce Commission as reparations for excessive freight charges illegally collected by the defendants.

Since the decision of the court a careful analysis and study of the written opinion of the court leads counsel to believe that the motion for a new trial has substantial grounds proper to be presented in argument to the court in support thereof, and inasmuch as the decision was rendered on January 28, 1930 and the term of court is about to expire, affiant believes that the ends of justice will be advanced and served if the motion presented herewith to vacate the judgment entered on January 28, 1930 as above stated and to vacate the orders overruling plaintiffs' motion in arrest of judgment and plaintiffs' motion for a new trial be allowed, so that the court may be further advised in respect to the grounds which may properly be urged in support of said motion for a new trial.

Affiant does not mean to intimate by the statement herein that the court arbitrarily denied counsel the right to be heard in support of the motion for a new trial, but to merely state that there had not been sufficient time in which to analyze and digest the court's opinion to enable counsel to advise the court of the legal reasons and arguments
554 which could be properly called to the court's attention in support of said motion for a new trial.

Further affiant sayeth not.

ELWOOD G. GODMAN.

Subscribed and sworn to before me, a Notary Public in and for the County and State aforesaid, this 31st day of January, A. D. 1930.

DONALD B. HATMAKER,
(Seal) *Notary Public.*

My commission expires Feb. 27, 1933.

State of Illinois } ss.
County of Cook. }

CLAIR R. HILLYER, being first duly sworn, deposes and says that he has read the foregoing affidavit of Elwood G. Godman, Esq., and was associated with Mr. Godman in the trial of the above-entitled case and knows the facts and joins in said affidavit of Mr. Godman and adopts the same as his own.

Further affiant sayeth not.

CLAIR R. HILLYER.

Subscribed and sworn to before me, a Notary Public in and for the County and State aforesaid, this 31st day of January, A. D. 1930.

DONALD B. HATMAKER
Notary Public.

(Seal)

My commission expires Feb. 27, 1933.

555 And thereupon on the motion of the plaintiffs the court entered their said motion to vacate the orders of January 28, 1930, and set the same for hearing on March 3, 1930. Said order appears in the record proper and reference thereto is hereby made.

And afterwards, to-wit, on February 27, 1930, came the plaintiffs, by their counsel, and moved the court to reset their motion to vacate the orders of the court of January 28, 1930, from March 3, 1930, to March 28, 1930.

And thereupon the said court granted said motion to re-set the motion of the plaintiffs to vacate the orders of January 28, 1930, and re-set the same from March 3, 1930, to March 28, 1930. Said order appears in the record proper and reference thereto is hereby made.

And afterwards, to-wit, on March 21, 1930, came the plaintiffs, by their counsel, and moved the court to re-set the motion of the plaintiffs to vacate the orders of the court of January 28, 1930, from March 28, 1930, to April 11, 1930.

And thereupon the said court granted said motion to re-set motion of the plaintiffs to vacate the orders of January

28, 1930, and re-set the same from March 28, 1930, to April 11, 1930. Said order appears in the record proper and reference thereto is hereby made.

And afterwards, to-wit, on April 7, 1930, on motion of the court the motion of the plaintiffs to vacate the orders of January 28, 1930, was continued to April 18, 1930. Said order appears in the record proper and reference thereto is hereby made.

And afterwards, to-wit, on April 11, 1930, came the plaintiffs, by their counsel, and presented and filed with the court their certain reasons in support of their motion to vacate and set aside the orders of the court entered in this cause on January 28, 1930, and also their certain motion to amend their original petition filed in this cause, and also their amendment to said petition; all of which are in the words and figures as follows, to-wit: Filed Apr. 1930.

556 • • (Caption) • •

REASONS ASSIGNED IN SUPPORT OF MOTION TO VACATE AND SET ASIDE ORDERS ENTERED IN THE ABOVE ENTITLED CAUSE ON JANUARY 28, 1930.

Now come the plaintiffs in the above entitled cause, by their attorneys, Sims, Godman & Stransky, and in support of and supplementary to their motion heretofore filed to set aside the following orders and judgment entered and appearing of record in this case on Tuesday, January 28, 1930,

1. Order denying and overruling plaintiffs' motion for new trial;
2. Motion overruling and denying plaintiffs' motion in arrest of judgment;
3. Judgment on the verdict in favor of defendants and against the plaintiffs, and against the plaintiffs for costs;
4. Orders allowing appeal, fixing time for bill of exceptions and amount of cost bond;

represent and show unto the court that on Tuesday, January 28, 1930, His Honor, Judge Woodward, presiding, announced his decision relative to a motion made at the close

of all of the testimony in said cause to direct the jury
557 sworn and impaneled in said cause to return a verdict in favor of the defendants and against the plaintiffs, and thereupon read a lengthy written opinion setting forth particularly the reasons for his decision granting said motion; that immediately after reading his said written opinion His Honor, Judge Woodward, instructed or directed the jury impaneled and sworn to try the issues in the said case to return a verdict in favor of the defendants and against the plaintiffs in said case; that said jury thereupon returned into open court, pursuant to said instruction and direction of the court, its verdict in favor of the defendants and against the plaintiffs in the case; that thereupon the plaintiffs verbally made a motion for a new trial, which motion was thereupon without argument or discussion overruled; that thereupon the plaintiffs verbally made a motion in arrest of judgment, which motion was also without argument or discussion overruled; that thereupon the court directed that judgment be entered in favor of the defendants and against the plaintiffs and against the plaintiffs for costs, and thereupon entered orders allowing an appeal to the plaintiffs, fixing the time for the filing of bill of exceptions and the amout of cost bond.

Plaintiffs, however, disclaim any intimation or insinuation that His Honor, Judge Woodward, arbitrarily denied counsel the right to be heard in support of said motions, because such is not the fact. Plaintiffs, however, represent to the court that the attorneys for the plaintiffs did not have sufficient time, prior to making said motions, to digest and analyze the lengthy opinion of His Honor, Judge Woodward, so as to then present to the court such arguments and mo-
tions as might be necessary and appropriate to meet or
558 overcome the reasons assigned by the court in its opinion for holding against plaintiffs; that after counsel had studied and analyzed the opinion of His Honor, Judge Woodward, it became apparent to counsel that the holding of the court directing a verdict in favor of the defendants and against the plaintiffs was based solely on the ground that plaintiffs had filed said petition in the above entitled cause in their individual capacities and that the proof offered in the case showed that the persons who were injured by the charging of the alleged excessive, unreasonable and unlawful loading and unloading charges set forth in said petition were the shippers of live stock who ultimately bore said charges

and not the plaintiffs named in said petition who represented said shippers in the various shipments of live stock mentioned and set forth in said petition; that the attorneys for said plaintiffs, after studying and analyzing the opinion of His Honor, Judge Woodward, and after a careful investigation of the facts in this case and a study of the law with reference to their right to amend the petition herein, came to the conclusion that by a proper amendment of the petition filed in the above entitled cause changing the capacity in which plaintiffs bring this suit the cause of action set forth in the petition filed herein may be properly maintained, in accordance with the opinion of the court; that thereafter at the same term of court in which the above-mentioned orders of said court were entered, plaintiffs filed their said motion to vacate and set aside said orders entered as aforesaid on Tuesday, January 28, 1930.

Plaintiffs further represent that they have duly filed in this cause their verified motion to amend the petition filed in this cause, particularly setting forth the facts and
559 circumstances with reference to the relationship existing between themselves and upwards of one hundred seventy-four thousand (174,000) shippers whom said plaintiffs represented in the various shipments of live stock in relation to which the excessive, unlawful and unreasonable charges set forth in the petition in this case arose, and showing particularly the capacity in which said plaintiffs appeared before said Interstate Commerce Commission and procured from said Interstate Commerce Commission the order of reparation in the sum of One Hundred Forty Thousand and One Dollars and Twenty-five Cents ($140,001.25), as set forth in the petition herein; that a copy of said verified motion to amend the petition herein is hereto attached and made a part of this motion.

Plaintiffs further represent that this motion to set aside and vacate the said orders entered as aforesaid by this Honorable Court on the 28th day of January, 1930, is made in good faith in order that said verified motion to amend said petition changing the capacity in which said plaintiffs bring this suit may be considered and passed upon by this Honorable Court.

Plaintiffs in seeking to have said orders so entered as aforesaid on Tuesday, January 28, 1930, vacated and set aside in order that they may be allowed to file and have considered and passed upon their said motion to amend their said

petition, respectfully reserve the right, in the event said motion to set aside said orders of January 28, 1930, is denied, to argue before this court and to contend in any court of review that the action of His Honor, Judge Woodward, in instructing the jury to return a verdict in favor of the
560 defendants and against the plaintiffs was and is erroneous.

SIMS GODMAN & STRANSKY
Attorneys for Plaintiffs.

EDWIN W. SIMS
ELWOOD G. GODMAN
FRANKLIN J. STRANSKY
CLAIR R. HILLYER
Of Counsel.

561 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Eastern Division of the

Northern District of Illinois.

George J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen, *et al.*,
Plaintiffs,
—*vs*—
Andrew W. Mellon, Director General of Railroads, as Agent, *et al.*,
Defendants.
No. 37517.

MOTION TO AMEND PETITION.

Now come the plaintiffs in the above-entitled cause, by Edwin W. Sims, Elwood G. Godman, Frankin J. Stransky and Clair R. Hillyer, their attorneys, and respectfully petition the court for leave to amend their petition filed in the above-entitled cause on the 8th day of December, A. D. 1928, in accordance with the draft of said proposed amendment hereto attached and made a part of this motion.

Your petitioners hereby represent to the court as grounds for granting leave to amend said petition filed in the above-entitled cause, as aforesaid, on the 8th day of December, A. D. 1928, the following facts, viz:

That prior to May 21, 1917, there was in effect a tariff published and filed with the Interstate Commerce Commission by the Union Stock Yard and Transit Company, one of the defendants in the above-entitled cause, which pro-
562 provided that charges of twenty-five cents (25c) for unloading each car of live stock and fifty cents (50c) for loading each car of live stock would be assessed by said defendant, the Union Stock Yard and Transit Company, on all cars of live stock loaded or unloaded by it at the Union Stock Yards in Chicago, Illinois; that there was also in effect another tariff published and filed with the Interstate Commerce Commission, to which the following named railroads were parties, viz: The Atchison, Topeka & Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; the Baltimore and Ohio Chicago Terminal Railroad Company; The Chesapeake and Ohio Railway Company of Indiana; The Chicago and Alton Railroad Company, and William W. Wheelock and William G. Bierd, Receivers; Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis & Louisville Railway Company; Chicago Junction Railway Company; Chicago, Milwaukee and St. Paul Railway Company, and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers; The Chicago, Rock Island and Pacific Railway Company; Chicago Terre Haute & Southeastern Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Grand Trunk Western Railway Company; Illinois Central Railroad Company; Indiana Harbor Belt Railroad Company; The Michigan Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; New York Central Railroad Company; New York, Chicago & St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; The Toledo, St. Louis & Western Railroad Company, and J. Frank Johnson and Harry A. Dunn, Receivers; and Wabash Railway Company, all of which railroads and
563 systems of transportation were operated and controlled by the predecessors in office of said Andrew W. Mellon during the period of federal control of railroads, to-wit: December 28, 1917, to March 1, 1920; that all of said railroad companies and corporations last named have and during said

period of federal control had systems of transportation and roads running through the Eastern Division of the Northern District of Illinois, with the exception of The Toledo, St. Louis & Western Railroad Company, and J. Frank Johnson and Harry A. Dunn, Receivers, which railroad company is now a part of the system of the New York, Chicago & St. Louis Railroad Company, and which system has a road running through the Eastern Division of the Northern District of Illinois; that said last-mentioned tariff, to which said railroads were parties, provided that the sum of twenty-five cents (25c) for unloading each car of live stock and fifty cents (50c) for loading each car of live stock would be absorbed and paid by said railroad companies, respectively, to said Union Stock Yard and Transit Company on all cars of live stock loaded or unloaded by that company at said Union Stock Yards and shipped into said Union Stock Yards by said railroads; that said last-mentioned tariff was and is known as Agent L. A. Lowry's Tariff 20-J, I. C. C. No. 37, and supplements thereto.

That effective May 21, 1917, the defendant the Union Stock Yard and Transit Company filed with said Interstate Commerce Commission its tariff I. C. C. No. 2, whereby it increased said charges from twenty-five cents (25c) per car for unloading to fifty cents (50c) per car for unloading, and from fifty cents (50c) per car for loading to seventy-five cents (75c) per car for loading; that no tariff was filed with said Interstate Commerce Commission by said railroads absorbing said increase in said unloading and loading charges, and
564 therefore all shippers and receivers of live stock were, after May 21, 1917, compelled to pay and did pay to said defendant the Union Stock Yard and Transit Company and to said railroads said increase in the charge, viz.:—twenty-five cents (25c) per car for unloading and twenty-five cents (25c) per car for loading, in accordance with said increase created by said tariff I. C. C. No. 2 filed as aforesaid with said Interstate Commerce Commission by said defendant Union Stock Yard and Transit Company; that effective with the taking over of said railroads under federal control, December 26, 1917, all shippers and receivers of live stock to and at said Union Stock Yards were compelled to and did pay to the respective Directors General of Railroads appointed by the President of the United States in accordance with the law the said increase of twenty-five cents (25c) per car for unloading and the said increase of twenty-five cents (25c) per car for loading; that during the said period from December 28, 1917,

to March 1, 1920, the stock yards of the said defendant the Union Stock Yard and Transit Company were the terminals of the predecessors in office of the said defendant Andrew W. Mellon in each of the shipments of live stock hereinafter referred to and on which the sum of fifty cents (50c) per car was exacted for unloading and the sum of seventy-five cents (75c) per car was exacted for loading; that upon the filing by said Union Stock Yard and Transit Company of its said tariff Supplement No. 1 to I. C. C. No. 6 there were filed with said Interstate Commerce Commission formal protests against said tariff, whereupon said Interstate Commerce Commission from time to time thereafter suspended the operation of said tariff and set the matter down for hearing under its Investigation and Suspension Docket No. 1118.

That on or about October 2, 1917, the Chicago Live
565 Stock Exchange, on behalf of its members and others engaged in the buying, selling and shipping of live stock to and at the Union Stock Yards at Chicago, Illinois, filed a complaint in writing with the Interstate Commerce Commission, alleging and charging said loading and unloading charges so fixed in said tariff I. C. C. No. 2, filed with said Interstate Commerce Commission by said defendant the Union Stock Yard and Transit Company and effective May 21, 1917, as aforesaid, to be unlawful, unjust and unreasonable under the Interstate Commerce Act; that the said Interstate Commerce Commission thereupon docketed said complaint under Interstate Commerce Commission Docket No. 9977; that the said carriers hereinabove specifically named, which were made defendants in said Case No. 9977 before said Interstate Commerce Commission, are the same carriers and railroads which are named in said petition filed in this court on the 8th day of December, A. D. 1928, as aforesaid; that said corporate carriers and railroads filed their answers to said complaint in said case No. 9977 before said Interstate Commerce Commission and the issues in said case were duly made; that said case Docket No. 9977 and said case Investigation and Suspension Docket No. 1118 were thereafter, by appropriate proceedings, duly consolidated before said Interstate Commerce Commission for hearing; that thereafter a full hearing was had with reference to said cases no or about February 11, 1919, at which hearing representatives of said Chicago Live Stock Exchange and of said corporate carriers and railroads were present and participated therein; that thereafter said Interstate Commerce Commission issued its report and decision in

said consolidated cases and dismissed said complaint, said report and decision being reported in 52 I. C. C. 209, at-
566 tached to the petition heretofore filed in this court on the 8th day of December, A. D. 1928, and therein designated Exhibit "C" to said petition and being made a part of said petition; that on or about April 14, 1919, upon petition of the complainant in said complaint Docket No. 9977 for rehearing and application to amend its complaint by making the Director General of Railroads a party defendant, the said Interstate Commerce Commission issued an order in said Docket No. 9977 and said Investigation and Suspension Docket No. 1118, in words and figures as follows:

"Supplemental Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 14th day of April, A. D. 1919.

No. 9977

Chicago Live Stock Exchange

vs.

The Atchison, Topeka & Santa Fe Railway Company *et al.*
Investigation and Suspension Docket No. 1118.

In the Matter of the Investigation and Suspension of Live Stock Loading and Unloading Charges at Chicago, Ill.

Upon further consideration of the records in the above-entitled proceedings, of petition for rehearing filed by the Chicago Live Stock Exchange and Union Stock Yard & Transit Company, and of application of the Chicago Live Stock Exchange to amend its complaint by making the Director General of Railroads a party defendant:

It Is Ordered, That these proceedings be, and they are hereby, reopened for further hearing, on the question of the amount of the loading and unloading charges for live stock at the Chicago stock yards, and the amount of such charges, if any, that should be imposed upon shippers of live stock, or should be absorbed by the defendants and whether the Chicago Stock Yards are terminals of the Chicago Junction Rail-

way Company, and whether the tariff arrangements be-
567 tween the Union Stock Yards & Transit Company and the other defendants with respect to the delivery and handling of live stock at the Union Stock Yards in Chicago are in compliance wiht the act.

It Is Further Ordered, That the petition of the Union Stock Yard & Transit Company, so far as it seeks a reopening of the case for the purpose of reconsideration of the finding that it is a common carrier, be, and it is hereby, denied.

It Is Further Ordered, That Walker D. Hines, Director General of Railroads, be, and he is hereby, made an additional party respondent herein.

It Is Further Ordered, That a copy of this order be served upon each of the parties to these proceedings.

And It Is Further Ordered, That these proceedings be, and they are hereby, assigned for further hearing on May 20, 1919, ten o'clock a. m., at United States Court Room, Chicago, Ill., before Examiner Gerry.

By the Commission:

GEORGE B. MCGINTY,
(Seal) *Secretary.*"

That thereafter said consolidated case, Docket No. 9977, and said Investigation and Susension Docket No. 1118, duly consolidated as aforesaid, were reheard by said Interstate Commerce Commission, the said Director General of Railroads being duly represented and taking an active part in said proceedings; that thereafter, on or about July 15, 1920, said Interstate Commerce Commission issued its report on further hearing reported in 58 I. C. C. 164, and found that the said unloading charges were unlawful and in violation of the Interstate Commerce Act, said decision and report being attached to the said petition heretofore filed in this court in this cause and there designated Exhibit "B" and made a part of said petition by reference; that on February 25, 1921, there was duly filed with said Interstate Commerce Commission a complaint for reparation on behalf of upwards of one hun-
dred seventy-four thousand (174,000) shippers of live
568 stock who had been damaged by the assessment and collection of said loading and unloading charges hereinabove set forth in the amount of such charges paid for them; that said complaint was given Interstate Commerce Commission Docket No. 12614; that said complaint for reparation was filed by the following named persons, or their legal prede-

cessors, who were members of said Chicago Live Stock Exchange between the dates of December 28, 1917, and February 28, 1920, when said excessive and unreasonable loading and unloading charges were paid, and who are plaintiffs named in Paragraph 2 of the petition herein:

Geo. J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen.

John G. Adler and Alfred E. Adler, copartners trading as Adler Sons & Company.

Alexander, Conover and Martin, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

John A. Babcock, an individual trading as John A. Babcock & Company.

Fred L. Heyne and E. H. Baker, copartners trading as Baker, Heyne & Company.

W. A. Peterson, trading as Bacon, Peterson & Company.

Bowles Live Stock Commission Company, a corporation organized and existing under the laws of the State of West Virginia with its principal place of business at Chicago in the State of Illinois.

E. C. Brown and Seth E. St. John, copartners trading as Brown-St. John Company.

569 Thos. H. Brown.

George M. Brownson and J. L. Ettlinger, copartners trading as Brownson & Ettlinger.

Byers Brothers Company, a corporation organized and existing under the laws of the State of Missouri with its principal place of business at Chicago in the State of Illinois.

Wm. B. Swiney, Chas. M. Swiney and Thos. E. Swiney, copartners trading as Swiney Bros., successors to Bunker & Swiney.

J. B. Cahill, trading as J. B. Cahill & Company.

Central Live Stock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Ernest Clark and Louis Armbrecht, copartners trading as Clark, Armbrecht & Company.

E. A. Clark, trading as Clark, Bowles & Company.

John Clay, John G. Forrest, C. A. Kleman, F. H. Connor and C. L. Robinson, copartners trading as Clay, Robinson & Company.

James R. Clegg, an individual trading as James R. Clegg & Company.

A. M. Henneberry and N. W. Cochran, copartners trading as Cochran & Henneberry.

W. P. Collings, trading as W. P. Collings & Son.

Conklin Bros. Commission Company, a coporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

570 H. D. Copeland & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

J. M. Corrick.

J. F. Cross and H. G. Sommers, copartners trading as Cross, Sommers & Company.

A. B. Daniels.

P. T. Dolan and Fred Ludeman, copartners trading as Dolan & Ludeman.

J. M. Doud & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

S. S. Driver, an individual trading as S. S. Driver & Company.

Chas. R. Beason and P. E. Moore, copartners trading as Drovers Commission Company.

J. W. Eastland, an individual trading as J. W. Eastland & Company.

Guy Wheeler and T. K. Polley, corpartners trading as Emmett, Wheeler & Polley.

E. H. Kuenster, surviving partner of copartnership of Erwin & Kuenster.

Evans, Snider, Buel Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Filler Wilson & McClelland, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

571 O. D. Freeland and C. M. Godfrey, copartners trading as Freeland & Godfrey.

Fred Freeman, an individual trading as Fred Freeman & Company.

P. J. Fitzgerald and G. S. Freeman, copartners trading as Freeman, Fitzgerald & Company.

Wm. Gentleman, A. M. Gentleman, C. F. Gentleman and G. J. Gentleman, copartners trading as Wm. Gentleman & Sons.

S. G. Gillogly, R. E. Gillogly, F. D. Gillogly and F. T. Gillogly, copartners trading as Gillogly & Company.

Chas. E. Harding, trading as Chas. E. Harding & Company.

Hefner Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Geo. F. Hogan, trading as Geo. F. Hogan & Company.

A. Warheimer, E. H. Ingwerson, J. H. Ingwerson, Dan R. Ingwerson, D. C. Mosier and A. C. Barroff, copartners trading as Ingwerson Bros.

Iowa Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois, with its principal place of business at Chicago in the State of Illinois.

I. W. Knettle and Edwin Knettle, copartners trading as Knettle Bros.

Knolfin Sheep Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

E. H. Kuenster, an individual trading as Kuenster Livestock Commission Company.

572 A. J. Laberthe.

L. S. Larrison, an individual trading as L. S. Larrison & Company.

Lee Live Stock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

F. C. Ludeman, an individual trading as F. C. Ludeman & Company.

McCausland, Hoag & Vaughn, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Wm. Mahoney.

J. P. Maley and Harry L. Carpenter, copartners trading as Maley, Carpenter & Company.

John P. Martin, James G. Martin, George E. Martin and Wm. S. Burmister, copartners trading as Martin Bros. & Company.

Miller White & Woods, a corporation organized and exist-

ing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

P. T. Dolan, trading as Miller & Dolan.

Frank R. Mullen, trading as Mullen Commission Company.

Robert S. Murray, trading as Murray & McDowell.

B. F. Hubbird, trading as Minteer Hubbird & Company.

National Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

573 Northwestern Livestock Commission, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

G. W. Nixon, C. S. Horn and W. H. Chisholm, copartners trading as Nixon, Horn & Chisholm.

North American Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

Silas Palmer and W. H. Palmer, copartners trading as Silas Palmer & Son.

T. B. Vincent and C. H. Boothroyd, copartners trading as Paris Commission Company.

W. C. Patterson, trading as John Patterson & Son.

W. A. Peterson and Wm. Turnbull, copartners trading as Peterson, Turnbull & Company.

J. H. Piatt, trading as Abner Piatt & Company.

Thos. K. Polley, trading as Thos K. Polley & Company.

R. H. Pritchard, trading as Pritchard Commission Company.

Chas. R. Rice and Oscar A. Rice, copartners trading as Rice Bros.

J. B. Roach and W. P. Roach, copartners trading as Roach Livestock Commission Company.

Rosenbaum Brothers & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

F. W. Sheldon, trading as F. W. Sheldon & Company.

W. Harry Sherwood and Russell H. Sherwood, co-
574 partners trading as Sherwood & Son.

J. Paul Shinn, Chas. H. Moberly and I. O. Fry, copart-

ners trading as Shinn, Fry & Moberly, successors to Shinn Fry & Company.

James G. Shutter.

W. R. Smith, J. C. Eastes and John Smith, copartners trading as W. R. Smith & Son.

T. B. Stafford and A. B. Stafford, copartners trading as Stafford Bros.

Standard Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

A. F. Starrett, Jr., O. A. Mathison, A. C. Granger and M. E. Peschong, copartners trading as Starrett, Mathison & Company.

Chas H. Stephens, and J. A. Goble, copartners trading as Stephens & Goble.

A. F. Stewart, trading as A. F. Stewart & Company.

J. E. Strader and J. L. Strader, copartners trading as Strader Bros.

J. J. Sullivan and J. C. Sullivan, co-partners trading as Sullivan Commission Company.

A. Gilmore, C. L. Swanson and C. J. Castenholz, copartners trading as Swanson, Gilmore & Castenholz.

Harry Thompson and C. N. Ball, copartners trading as Thompson & Ball.

Thos. Tipton, E. M. Steck and W. P. Herrick, copartners trading as Tipton, Steck & Herrick.

D. L. Trout and F. L. Trout, copartners trading as Trout Livestock Commission Company.

575 G. V. Van Norman, an individual trading as G. B. Van Norman & Company.

Van Norman Lawler & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois.

W. H. Walter, trading as Walter Bros.

A. A. Walters, C. A. Dunbar and J. H. Dunbar, copartners trading as Walters & Dunbar.

L. B. Werden.

W. W. Wilson and Chas. A. Wilson, copartners trading as W. W. Wilson & Company.

Jet Wimp, trading as Jet Wimp & Company.

Kay Wood and Chas. A. Wood, copartners trading as Wood Bros.

Curtis A. Wood and Walter R. Wood, copartners trading as Curtis A. Wood & Company.
L. B. Yancey.
W. E. Young, trading as W. E. Young & Company.

That said complaint was filed jointly by the above-named commission merchants and members of said Chicago Live Stock Exchange as representative of said shippers of live stock numbering upwards of one hundred seventy-four thousand (174,000), and whose names were contained in Appendix A attached to said complaint for reparation filed with said Interstate Commerce Commission; that although in said proceedings for reparation before said Interstate Commerce Commission the above-named commission merchants and members of said Chicago Live Stock Exchange acted jointly with each other, each of the above-named commission
576 merchants and members of said Chicago Live Stock Exchange in said proceedings respectively presented and represented the claims of the particular shippers of live stock whom they had previously represented and acted for as commission merchants in the various shipments of live stock made between December 28, 1917, and February 28, 1920, and upon which said unreasonable and unlawful loading and unloading charges were made; that in each instance where said unreasonable and unlawful loading and unloading charges were made, the same were paid to said corporate carriers and railroads, or the liability to pay the same was primarily and directly assumed by said commission merchants and members of said Chicago Live Stock Exchange and in the first instance paid out of the individual funds or moneys of said commission merchants and members of said Chicago Live Stock Exchange and charged back against said individual shippers or deducted from the proceeds due to said individual shippers from said shipments, with the representation and assurance by said commission merchants and members of said Chicago Live Stock Exchange that they, in behalf of said shippers, would present to said Interstate Commerce Commission a claim for reparation for the use and benefit of said shippers; that said proceedings for reparation before said Interstate Commerce Commission were prosecuted by the above-named commission merchants and members of said Chicago Live Stock Exchange, on the theory that each of said members of said Chicago Live Stock Exchange doing business in said Union Stock Yards as commission merchants was seeking reparation in a representative capacity for the use

and benefit of the particular shippers of live stock who, during said period between December 28, 1917, and February 28, 1920, had shipped live stock to such member, and which member in the first instance paid said excessive and unlawful
577 loading and unloading charges on shipments made by the particular customer shippers to such member, and primarily paid or assumed by said member and charged back to said individual customer shippers as aforesaid; that in said proceedings for reparation before said Interstate Commerce Commission said Interstate Commerce Commission proceeded on the theory and basis that each of said individual members of said Live Stock Exchange whose names are hereinabove mentioned and set forth, were seeking reparation as representatives of and for the use and benefit of the particular shippers whom they severally represented in said shipments of live stock made between December 28, 1917, and February 28, 1920, and whose identity was and is shown by the list of names of shippers set forth in Appendix A filed in said proceedings for reparation before said Interstate Commerce Commission for the purpose of making said shippers, (numbering upwards of one hundred seventy-four thousand (174,000) as aforesaid), parties to the record in said Interstate Commerce Commission proceedings; that said list of shippers so filed was duly registered and accepted by said Commission, as will more fully appear by the decisions, opinions and reports of said Interstate Commerce Commission in said reparation proceedings referred to and made a part of said petition heretofore filed in this court in the above entitled cause as aforesaid; that in said proceedings for reparation said Interstate Commerce Commission awarded reparation to each of said members of said Chicago Live Stock Exchange doing business in said Union Stock Yards as commission merchants, for the aggregate amount of the excessive loading and unloading charges primarily paid and assumed as aforesaid by each member on account of shipments made to such member by the particular shippers of live stock
578 represented in said shipments by such member, as will more fully appear from the order of said Commission in said consolidated cases Nos. 9977 and 12614, said order bearing date the 12th day day of December, A. D. 1927, a true and correct copy thereof being attached as Exhibit "A" to said petition filed in this court in the above entitled cause and made a part of said petition by reference and to the same extent and as fully as though the same were therein set out;

that each line or item in said Exhibit "A", under columns designated "Complainants", "Defendants" and "Amounts", are compilations made from Commission Exhibit 1-A, consisting of approximately twelve thousand (12,000) sheets filed in said Dockets Nos. 1118, 9977 and 12614 of said Interstate Commerce Commission, on which sheets there appears a detailed and precise statement of the history of each shipment on which said excesive and unlawful loading and unloading charges were made, and setting forth the number and initial of the car, the date of delivery, the number and date of the way-bill, the name of the originating station, the name of the consignor, the name of the consignee, the route, the commodity, the amount of reparation claimed, and the amount of interest at six per cent claimed on the amount of such reparation; that by comparing the various items on said sheets of said Exhibit 1-A with the items aforesaid set forth in said Exhibit "A" filed with the petition herein and made a part thereof by reference, the identity between each individual shipper mentioned and referred to in said Appendix A, consisting of upwards of one hundred seventy-four thousand (174,000) names, and the particular commission merchant and member of said Live Stock Exchange who represented said shipper in said shipments, and who in turn represented said shipper before said Interstate Commerce Commission in said claim for reparation, may be fully established;

579 That in the trial of the above entitled cause in this court there was introduced in evidence the complete records and files of said Interstate Commerce Commission in said Dockets Nos. 1118, 9977 and 12614, including said Appendix A, consisting of the names and identity of upwards of one hundred seventy-four thousand (174,000) shippers in whose behalf reparation was sought before said Interstate Commerce Commission as aforesaid, said Exhibit 1-A, consisting of approximately twelve thousand (12,000) sheets containing a detailed history of each shipment, the number and initial of the car, the date of its delivery, the number and date of the way-bill, the name of the originating station, the name of the consignor, the name of the consignee, the route, the commodity, the reparation claimed, and the interest claimed on said reparation, and the order of said Interstate Commerce Commission entered on the 12th day of December, A. D. 1927, as aforesaid, a copy of which is attached to the petition filed in the above entitled cause in this court and marked Exhibit A and made a part of said petition;

so that your petitioners represent to the court that from the record in this cause, and from the record in said Dockets Nos. 1118, 9977 and 12614 of said Interstate Commerce Commission, there is shown all of the facts hereinabove set forth, on the basis of which it can readily be determined that in said proceedings before said Interstate Commerce Commission each of the plaintiffs in the above entitled cause in this court represented and secured reparation for and on behalf of the individual shippers respectively represented by such plaintiffs during the period aforesaid.

Your petitioners further show to the court that by reason of the facts and circumstances hereinabove set forth each of your petitioners (who are identical with the plain-
580 tiffs named in said petition filed in this court in the above entitled cause on the 8th day of December, A. D. 1928) by operation of law became and now are trustees of an express trust, with the duty and obligation of enforcing in this court in their respective representative capacities, for the use and benefit of the individual shippers whom they represented in said shipments and whom they represented in said proceedings for reparation before said Interstate Commerce Commission, the award of reparation made to them by said Interstate Commerce Commission as representatives of and for the use and benefit of said individual shippers.

Your petitioners further show unto the court that in the petition heretofore filed in this court in the above entitled cause on the 8th day of December, A. D. 1926, your petitioners brought this suit in their individual names as plaintiffs, on the theory that because of the fact that they in the first instance paid to said defendants the amount of said excessive and unlawful loading and unloading charges, that there was such privity between them and the defendants in said cause as would legally entitle your petitioners to institute said suit in this court to enforce said award of reparation of said Interstate Commerce Commission, but that Your Honor has held against this theory, and has heretofore, on that ground, directed the jury impanelled to try said cause, to return a verdict of not guilty against the above-named defendants; that your petitioners respectfully petition Your Honor for leave to amend their said petition filed in this court in the above entitled cause on the 8th day of December, A. D. 1928, by changing the capacity in which said plaintiffs bring this suit to a representative capacity, whereby each of your
581 petitioners and plaintiffs named in the said petition filed in this court in the above entitled cause, as aforesaid,

may sue to enforce said award of reparation of said Interstate Commerce Commission as representatives and trustees of the particular shippers of live stock whom they represented in the various shipments covered by said order of reparation of said Interstate Commerce Commission and whose claims for reparation were presented and prosecuted by them as aforesaid before said Interstate Commerce Commission.

Your petitioners attach hereto, as a part of this motion to amend petition, their proposed amendment, same being marked Exhibit "A".

EDWIN W. SIMS
ELWOOD G. GODMAN
FRANKLIN J. STRANSKY
CLAIR R. HILLYER
Attorneys for said plaintiffs.

State of Illinois } ss.
County of Cook }

CLAIR R. HILLYER, being first duly sowrn, on oath deposes and says:

That he is of counsel for the plaintiffs in the above entitled cause; that he has read and carefully examined the above and foregoing motion to amend petition and is thoroughly familiar with the contents thereof; that he was attorney for said plaintiffs and for said Chicago Live Stock Exchange in all of the various proceedings before said
582 Interstate Commerce Commission subsequent to April 1, 1919; that he attended all of the hearings in said matters before said Interstate Commerce Commission subsequent to April 1, 1919; that previous to the time of the institution of said proceedings, and at the time of the pendency thereof, he had full knowledge of the relationship between said plaintiffs and the individual shippers whom they represented in said proceedings, and that the facts as hereinabove set forth in said motion to amend said petition are true as therein stated.

CLAIR R. HILLYER

Subscribed and sworn to before me, the undersigned Notary Public in and for the County of Cook and State of Illinois, this 11th day of April, A. D. 1930.

FRANCES BECKER
Notary Public.

(Seal)

583 * * (Caption) * *

AMENDMENT TO PETITION.

Now comes the plaintiffs in the above entitled cause, by Edwin. W. Sims, Elwood G. Godman, Franklin J. Stransky and Clair R. Hillyer, their attorneys, and, by leave of court first obtained, file this as their amendment to the petition in the above entitled cause filed in this court on the 8th day of December, A. D. 1928.

1. Strike from paragraph (2) of said petition, on page 2 thereof, after the word "plaintiffs" in the first line of said paragraph, the following:

"are, and each of them is, named in an order of the Interstate Commerce Commission entered on the 12th day of December, 1927, as being entitled to receive from the defendants hereinafter named the amounts respectively set forth in said order of the Commission, a copy of which is hereto attached as Exhibit 'A' and made a part hereof to the same extent and as fully as though the same were here set out:

The following named are the plaintiffs herein and are the parties entitled to receive the damages awarded by the Interstate Commerce Commission:"

584 2. At the end of said paragraph (2) of said petition, on page 9 thereof, insert the following:

That the above mentioned plaintiffs bring this suit as trustees and representatives for the use and benefit of the individual shippers whom they or their legal predecessors represented in the shipments of live stock and in the proceedings for reparation before the Interstate Commerce Commission, by virtue of the following facts, viz:

That prior to May 21, 1917, there was in effect a tariff published and filed with the Interstate Commerce Commission by the Union Stock Yard and Transit Company, one of the defendants in the above entitled cause, which provided that charges of twenty-five cents (25c) for unloading each car of live stock and fifty cents (50c) for loading each car of live stock would be assessed by said defendant, the Union Stock Yard and Transit Company, on all cars of live stock loaded or unloaded by it at the Union Stock Yards in Chicago, Illinois; that there was also in effect another tariff published and filed with the Interstate Commerce Commission, to which the following named railroads were parties, viz: The Atchison,

Topeka & Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; The Chesapeke and Ohio Railway Company of Indiana; The Chicago and Alton Railroad Company, and William W. Wheelock and William G. Bierd, Receivers; Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis & Louisville Railway Com-
585 pany; Chicago Junction Railway Company; Chicago, Milwaukee and St. Paul Railway Company, and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers; The Chicago, Rock Island and Pacific Railway Company; Chicago, Terre Haute & Southeastern Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Grand Trunk Western Railway Company; Illinois Central Railroad Company; Indiana Harbor Belt Railroad Company; The Michigan Central Railroad Company; Minneapolis, St. Paul & Sault Ste Marie Railway Company; New York Central Railroad Company; New York, Chicago & St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; The Toledo, St. Louis & Western Railroad Company, and J. Frank Johnson and Harry A. Dunn, Receivers; and Wabash Railway Company, all of which railroads and systems of transportation were operated and controlled by the predecessors in office of said Andrew W. Mellon during the period of Federal control of railroads, to-wit: December 28, 1917, to March 1, 1920; that all of said railroad companies and corporations last named have and during said period of Federal control had systems of transportation and roads running through the Eastern Division of the Northern District of Illinois, with the exception of The Toledo, St. Louis & Western Railroad Company, and J. Frank Johnson and Harry A. Dunn, Receivers, which railroad company is now a part of the system of the New York, Chicago & St. Louis Railroad Company, and which system has a road running through the Eastern Division of the Northern District of Illinois; that said last-mentioned tariff, to which said railroads were parties, provided that the sum of twenty-five cents (25c) for unloading each car of live
586 stock and fifty cents (50c) for loading each car of live stock would be absorbed and paid by said railroad com-

panies, respectively, to said Union Stock Yard and Transit Company on all cars of live stock loaded or unloaded by that company at said Union Stock Yards and shipped into said Union Stock Yards by said railroads; that said last-mentioned tariff was and is known as Agent L. A. Lowry's Tariff 20-J, I. C. C. No. 37, and supplements thereto.

That effective May 21, 1917, the defendant the Union Stock Yard and Transit Company, filed with said Interstate Commerce Commission its tariff I. C. C. No. 2, whereby it increased said charges from twenty-five cents (25c) per car for unloading to fifty cents (50c) per car for unloading, and from fifty cents (50c) per car for loading to seventy-five cents (75c) per car for loading; that no tariff was filed with said Interstate Commerce Commission by said railroads absorbing said increase in said unloading and loading charges, and therefore all shippers and receivers of live stock were, after May 21, 1917, compelled to pay and did pay to said defendant the Union Stock Yard and Transit Company and to said railroads said increase in the charge, viz: twenty-five cents (25c) per car for unloading and twenty-five cents (25c) per car for loading, in accordance with said increase created by said tariff I. C. C. No. 2 filed as aforesaid with said Interstate Commerce Commission by said defendant Union Stock Yard and Transit Company; that effective with the taking over of said railroads under federal control on December 28, 1917, all shippers and receivers of live stock to and at said Union Stock Yards were compelled to and did pay to the

respective Director Generals of Railroads appointed by
587 the President of the United States in accordance with

the law, the said increase of twenty-five cents (25c) per car for unloading and the said increase of twenty-five cents (25c) per car for loading; that during the said period from December 28, 1917, to March 1, 1920, the stock yards of the said defendant the Union Stock Yard and Transit Company were the terminals of the predecessors in office of the said defendant Andrew W. Mellon in each of the shipments of live stock hereinafter referred to and on which the sum of fifty cents (50c) per car was exacted for unloading and the sum of seventy-five cents (75c) per car was exacted for loading; that upon the filing by said Union Stock Yard and Transit Company of its said tariff Supplement No. 1 to I. C. C. No. 6, there were filed with said Interstate Commerce Commission formal protests against said tariff, whereupon said Interstate Commerce Commission from time to time thereafter

suspended the operation of said tariff and set the matter down for hearing under its Investigation and Suspension Docket No. 1118.

That on or about October 2, 1917, the Chicago Live Stock Exchange, on behalf of its members and others engaged in the buying, selling and shipping of live stock to and at the Union Stock Yards at Chicago, Illinois, filed a complaint in writing with the Interstate Commerce Commission, alleging and charging said loading and unloading charges so fixed in said tariff I. C. C. No. 2, filed with said Interstate Commerce Commission by said defendant the Union Stock Yard and Transit Company and effective May 21, 1917, as aforesaid, to be unlawful, unjust and unreasonable under the Interstate Commerce Act; that the said Interstate Commerce Commission thereupon docketed said complaint under Interstate
588 Commerce Commission Docket No. 9977; that the said carriers hereinabove specifically named, which were made defendants in said Case No. 9977 before said Interstate Commerce Commission, are the same carriers and railroads which are named in said petition filed in this court on the 8th day of December, A. D. 1928, as aforesaid; that said corporate carriers and railroads filed their answers to said complaint in said case No. 9977 before said Interstate Commerce Commission and the issues in said case were duly made; that said case Docket No. 9977 and said case Investigation and Suspension Docket No. 1118 were thereafter, by appropriate proceedings, duly consolidated before said Interstate Commerce Commission for hearing; that thereafter a full hearing was had with reference to said cases, on or about February 11, 1919, at which hearing representatives of said Chicago Live Stock Exchange and of said corporate carriers and railroads were present and participated therein; that thereafter said Interstate Commerce Commission issued its report and decision in said consolidated cases and dismissed said complaint, said report and decision being reported in 52 I. C. C. 209, attached to the petition heretofore filed in this court on the 8th day of December, A. D. 1928, and therein designated Exhibit "C" to said petition and being made a part of said petition; that on or about April 14, 1919, upon petition of the complainant in said complaint Docket No. 9977 for rehearing and application to amend its complaint by making the Director General of Railroads a party defendant, the said Interstate Commerce Commission issued an order in said Docket No. 9977 and said Investigation and Suspension Docket No. 1118, in words and figures as follows:

589 "Supplemental Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 14th day of April, A. D. 1919.

No. 9977.

Chicago Live Stock Exchange

vs.

The Atchison, Topeka & Santa Fe Railway Company, *et al.*
Investigation and Suspension Docket No. 1118.

In the Matter of the Investigation and Suspension of Live Stock Loading and Unloading Charges at Chicago, Ill.

Upon further consideration of the records in the above entitled proceedings, of petition for rehearing filed by the Chicago Live Stock Exchange and Union Stock Yard and Transit Company, and of application of the Chicago Live Stock Exchange to amend its complaint by making the Director General of Railroads a party defendant:

It Is Ordered, That these proceedings be, and they are hereby, reopened for further hearing, on the question of the amount of the loading and unloading charges for live stock at the Chicago stock yards, and the amount of such charges, if any, that should be imposed upon shippers of live stock, or should be absorbed by the defendants and whether the Chicago Stock Yards are terminals of the Chicago Junction Railway Company, and whether the tariff arrangements between the Union Stock Yard & Transit Company and the other defendants with respect to the delivery and handling of live stock at the Union Stock Yards in Chicago are in compliance with the act.

It Is Further Ordered, That the petition of the Union Stock Yard & Transit Company, so far as it seeks a reopening of the case for the purpose of reconsideration of the finding that it is a common carrier, be, and it is hereby, denied.

It Is Further Ordered, That Walker D. Hines, Director General of Railroads, be, and he is hereby, made an additional party respondent herein.

It Is Further Ordered, That a copy of this order be served upon each of the parties to these proceedings.

And It Is Further Ordered, That these proceedings be and they are hereby assigned for further hearing on May
590 20, 1919, ten o'clock a. m., at United States Court Room, Chicago, Illinois, before Examiner Gerry.

By the Commission:

GEORGE B. McGINTY,
(Seal) *Secretary.*"

That thereafter said consolidated case, Docket No. 9977, and said Investigation and Suspension Docket No. 1118, duly consolidated as aforesaid, were reheard by said Interstate Commerce Commission, the said Director General of Railroads being duly represented and taking an active part in said proceedings; that thereafter, on or about July 15, 1920, said Interstate Commerce Commission issued its report on further hearing reported in 58 I. C. C. 164, and found that the said unloading and loading charges were unlawful and in violation of the Interstate Commerce Act, said decision and report being attached to he said petition heretofore filed in this court in this cause and there designated Exhibit "B" and made a part of said petition by reference; that on February 25, 1921, there was duly filed with said Interstate Commerce Commission a petition or complaint for reparation on behalf of upwards of 174,000 shippers of live stock who had been damaged by the assessment and collection of said loading and unloading charges hereinabove set forth in the amount of such charges paid for them; that said complaint was given Interstate Commerce Commission Docket No. 12614; that said complaint for reparation was filed by the above-named plaintiffs, or their legal predecessor, who were members of said Chicago Live Stock Exchange between the dates of December 28, 1917, and February 28, 1920, when said excessive and unreasonable loading and unloading charges were paid.

That said petition or complaint for reparation was filed jointly by the above named commission merchants and
591 members of said Chicago Live Stock Exchange as representatives of said shippers of live stock numbering upwards of one hundred seventy-four thousand (174,000), and whose names were contained in Appendix A attached to said complaint for reparation filed with said Interstate Commerce Commission; that although in said proceedings for reparation before said Interstate Commerce Commission the above-named commission merchants and members of said Chicago Live Stock Exchange acted jointly with each other, each of the above-named commission merchants and members of said Chi-

cago Live Stock Exchange in said proceedings respectively presented and represented the claims of the particular shippers of live stock whom they had previously represented and acted for as commission merchants in the various shipments of live stock made between December 28, 1917, and February 28, 1920, and upon which said unreasonable and unlawful loading and unloading charges were made; that in each instance where said unreasonable and unlawful loading and unloading charges were made, the same were paid to said corporate carriers and railroads, or the liability to pay the same was primarily and directly assumed by said commission merchants and members of said Chicago Live Stock Exchange and in the first instance paid out of the individual funds or moneys of said commission merchants and members of said Chicago Live Stock Exchange and charged back against said individual shippers or deducted from the proceeds due to said individual shippers from said shipments, with the representation and assurance by said commission merchants and members of said Chicago Live Stock Exchange that they, in behalf of said shippers, would present to said Interstate Commerce Commission a claim for reparation for the use and benefit of said shippers; that said proceedings for reparation before said Interstate Commerce Commission were
592 prosecuted by the above-named commission merchants and members of said Chicago Live Stock Exchange, on the theory that each of said members of said Chicago Live Stock Exchange doing business in said Union Stock Yards as commission merchants was seeking reparation in a representative capacity for the use and benefit of the particular shippers of live stock who, during said period between December 28, 1917, and February 28, 1920, had shipped stock to such member, and which member in the first instance paid said excessive unlawful loading and unloading charges on shipments made by the particular customer shippers to such member, and primarily paid or assumed by said member and charged back to said individual customer shippers as aforesaid; that in said proceedings for reparation before said Interstate Commerce Commission said Interstate Commerce Commission proceeded on the theory and basis that each of said individual members of said Live Stock Exchange whose names are hereinabove mentioned and set forth in paragraph 2 of the petition herein, were seeking reparation as representatives of and for the use and benefit of the particular shippers whom they severally represented in said shipments of live stock made between December 28, 1917, and February

28, 1920, and whose identity was and is shown by the list of names of shippers set forth in Appendix A filed in said proceedings for reparation before said Interstate Commerce Commission, for the purpose of making said shippers, numbering upwards of one hundred seventy-four thousand (174,000), as aforesaid, parties to the record in said Interstate Commerce Commission proceedings; that said list of shippers so filed was duly registered and accepted by said Commission, as will more fully appear by the decisions, opinions and reports of said Interstate Commerce Commission in said
593 reparation proceedings referred to and made a part of said petition heretofore filed in this court in the above entitled cause as aforesaid; that in said proceedings for reparation said Interstate Commerce Commission awarded reparation to each of said members of said Chicago Live Stock Exchange doing business in said Union Stock Yards as commission merchants, for the aggregate amount of the excessive loading and unloading charges primarily paid and assumed as aforesaid by each member on account of shipments made to such member by the particular shippers of live stock represented in said shipments by such member, as will more fully appear from the order of said Commission in said consolidated cases Nos. 9977 and 12614, said order bearing date the 12th day of December, A. D. 1927, a true and correct copy thereof being attached as Exhibit "A" to said petition filed in this court in the above entitled cause and made a part of said petition by reference and to the same extent and as fully as though the same were therein set out.

Plaintiffs represent that in the said proceedings hereinabove set forth before the said Interstate Commerce Commission they, and each of them, well knew that in the records and files in said proceedings before said Interstate Commerce Commission, as well as by verbal statements and representations made in said proceedings before said Interstate Commerce Commission by the attorneys and representatives of these plaintiffs, it was expressly stated and set forth that they were acting for and on behalf of the several individual shippers whom they respectively represented in said shipments and whom they jointly represented in said proceedings for reparation before said Interstate Commerce Commission and in the capacity of trustees of an express declared trust in favor of an for the use and benefit of the respective shippers whom they represented in said shipments and whom they
594 represented in said proceedings for reparation before said Interstate Commerce Commission, and that they, and

each of them, well knew that said individual shippers had knowledge of said proceedings before said Interstate Commerce Commission and acquiesced in the representation of their said several claims for reparation by said plaintiffs. Wherefore, plaintiffs represent that by operation of law they became and now are trustees of an express trust, with the duty and obligation of enforcing in this court, in their respective representative capacity, for the use and benefit of the individual shippers whom they severally represented in said shipments and whom they represented in said proceedings for reparation before said Interstate Commerce Commission, the award of reparation made to them, as hereinafter set forth, by said Interstate Commerce Commission, in the sum of One Hundred Forty Thousand and One Dollars and Twenty-five Cents ($140,001.25), as representatives of and for the use and benefit of said individual shippers, and in that capacity they bring this suit.

3. Strike from said petition paragraph 8, paragraph 9, paragraph 10, paragraph 12, paragraph 13, paragraph 14 and paragraph 16 thereof, found on pages 13 to 19, inclusive.

4. Strike from said petition paragraph 17, on pages 19 and 20 of said petition, and insert in lieu thereof the following:

(17) Plaintiffs further represent that in said consolidated cases Nos. 9977 and 12614, these plaintiffs, or their legal predecessors, represented before said Interstate Com-
595 merce Commission the rights and interest of said shippers, numbering upwards of one hundred seventy-four thousand (174,000), as hereinabove set forth; that said Interstate Commerce Commission in said consolidated cases Nos. 9977 and 12614, held public meetings, at which meetings evidence was heard and taken in said causes, and at which hearing said defendants were represented; that after said public hearings had been fully completed and said consolidated causes fully argued by representatives of all of said parties in interest, said Interstate Commerce Commission, on or about June 2, 1925, issued its consolidated decision and report in said causes, in which it found that the loading and unloading charges above referred to and described were unjust and unreasonable, and that reparation, with legal interest, should be made by said defendants on account of the collection by said defendants of said unjust and unreasonable charges, which said decision and report is reported in 100 I. C. C. 226, a copy thereof being hereto attached, marked Exhibit "D",

and made a part hereof as though the same were fully set forth in this petition.

SIMS GODMAN & STRANSKY,
Attorneys for Plaintiffs.

EDWIN W. SIMS,
ELWOOD G. GODMAN,
FRANKLIN J. STRANSKY,
CLAIR R. HILLYER,
Of Counsel.
Continental Illinois Bank Building,
Chicago, Illinois.

596 And afterwards, to wit, on April 18, being the day theretofore set by the court, the court heard the argument of counsel on the motion of the plaintiffs to vacate the orders of the court entered in this cause on January 28, 1930, and the motion of the plaintiffs to amend their original petition in this cause, and at the conclusion of said argument said matter was taken under advisement by the court. Said order taking same under advisement appears in the record proper and reference thereto is hereby made.

And afterwards, to wit, on July 31, 1930, being one of the days of the regular July 1930 term, the motion of the plaintiffs to vacate the orders of the court of January 28, 1930, and the motion of the plaintiffs to amend their original petition in this cause were, and each of them was, denied by the court.

To which ruling of the court the plaintiffs and each of them by their counsel then and there duly excepted.

Thereupon the court filed its opinion in this cause on the motions of the plaintiffs to set aside the orders of January 28, 1930, and to amend their original petition herein. Said opinion appears in the record proper and reference to the same is hereby made.

Thereupon, to wit, on July 31, 1930, the court made and entered of record its order granting the plaintiffs until September 22, 1930, for filing an appeal bond in the sum of five hundred dollars ($500.00), and until October 6, 1930, for filing their bill of exceptions. Thereafter, to wit, on August 28, 1930, being one of the days of the regular July 1930 term, the court amended its order of July 31, 1930, whereby an appeal was allowed the plaintiffs upon filing an appeal bond on or before September 22, 1930, and Bill of Exceptions to be

filed October 6, 1930, and said order of amendment was
597 entered of record. Thereafter and within the time originally fixed for filing the bill of exceptions the court made and entered of record an order enlarging the time for filing said bill of exceptions to October 25, 1930, and also entered its order extending the time for the plaintiffs to docket their appeal in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit to October 31, 1930. All of the aforesaid orders appear in the record proper and reference to them is hereby made.

cate of ge. Forasmuch as the matters above set forth do not otherwise appear of record, the plaintiffs and each of them tender this their bill of exceptions which contains all the evidence introduced by all of the parties at the trial of the above-entitled cause, and pray that said bill may be allowed, settled, signed, sealed, filed, and made a part of the record in this cause, all of which is accordingly done by the court and by the Judge of this court pursuant to the statute in such case made and provided, all on this 24th day of October, A. D. 1930, which is within the time heretofore granted by the court within which to file said bill of exceptions.

CHARLES E. WOODWARD
Judge of the United States District Court
for the Northern District of Illinois.

ed Oct. 24, 0. 599 And afterwards, to wit, on the 24th day of October, 1930, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge, appears the following entry, to wit:

600 * * (Caption.) * *

ORDER.

Now come the parties hereto by their respective counsel, upon the presentation to the court for allowing settling, signing, sealing and filing, the bill of exceptions on behalf of the plaintiffs herein, and counsel for the defendants having agreed in open court that the said bill of exceptions is correct and proper, and the court having examined the same and being satisfied that said bill of exceptions is correct and proper,

It Is Ordered that the said bill of exceptions on behalf of

the plaintiffs herein be and the same is hereby allowed, settled, signed, sealed, filed and made a part of the record in this cause, all of which is done on this 24th day of October, 1930, within the time fixed theretofore by the court.

CHARLES E. WOODWARD
District Judge

601 And afterwards, to wit, on the 24th day of October 1930, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge, appears the following entry, to wit: Entered 1930.

602 * * (Caption.) * *

ORDER.

On motion of the plaintiffs and consent of the defendants by their counsel in open court, and it being the opinion of the court that certain original papers and documents should be transmitted to the United States Circuit Court of Appeals for the Seventh Judicial Circuit for consideration by the court in connection with the appeal of the plaintiffs herein, It Is Therefore

Ordered that the following papers, maps, photographs, documents, and box, to-wit: Defendants' Exhibits No. 1, Nos. 5 to 43 inclusive, and No. 45, which are referred to and described in the Bill of Exceptions and incorporated therein by reference be separately transmitted under his proper certificate by the Clerk of this court to the Clerk of the United States Circuit Court of Appeals for the Seventh Judicial Circuit and to be returned after the disposition of the 603 said appeal to the Clerk of this court.

CHARLES E. WOODWARD
District Judge.

Dated October 24, 1930.

294 And on, to wit, the 22nd day of September, 1930 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court a certain Assignment of Errors in words and figures following, to wit:

pt. 30, 295 * * * (Caption.) * *

ASSIGNMENT OF ERRORS.

And now come the plaintiffs-appellants, Geo. J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen; John G. Adler and Alfred E. Adler, copartners trading as Adler Sons & Company; Alexander, Conover and Martin, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; John A. Babcock, an individual trading as John A. Babcock & Company; Fred L. Heyne and E. H. Baker, copartners trading as Baker, Heyne & Company; W. A. Peterson, trading as Bacon, Peterson & Company; Bowles Live Stock Commission Company, a corporation organized and existing under the laws of the State of West Virginia with its principal place of business at Chicago in the State of Illinois; E. C. Brown and Seth B. St. John, copartners trading as Brown-St. John Company; Thos. H. Brown; George M. Brownson and J. L. Ettlinger, copartners trading as Brownson & Ettlinger; Byers Brothers Company, a corporation organized and existing under the laws of the State of
Missouri with its principal place of business at Chicago
296 in the State of Illinois; Wm. B. Swiney, Chas. M. Swiney and Thos. E. Swiney, copartners trading as Swiney Bros., successors to Bunker & Swiney; J. B. Cahill, trading as J. B. Cahill & Company; Central Live Stock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Ernest Clark and Louis Armbrecht, copartners trading as Clark, Armbrecht & Company; E. A. Clark, trading as Clark, Bowles & Company; John Clay, John G. Forrest, C. A. Kleman, F. H. Connor and C. L. Robinson, copartners trading as Clay, Robinson & Company; James R. Clegg, an individual trading as James R. Clegg & Company; A. M. Henneberry and N. W. Cochran, copartners trading as Cochran & Henneberry; W. P. Collings, trading as W. P. Collings & Son; Conklin Bros. Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; H. D. Copeland & Company, a corporation organized and existing under the laws of the State of Illinois

with its principal place of business at Chicago in the State of Illinois; J. M. Corrick; J. F. Cross and H. G. Sommers, copartners trading as Cross, Sommers & Company; A. B. Daniels; P. T. Dolan and Fred Ludeman, copartners trading as Dolan & Ludeman; J. M. Doud & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; S. S. Driver, an individual trading as S. S. Driver & Company; Chas. R. Beason and P. E. Moore, copartners trading as Drovers Commission Company; J. W. Eastland, an individual trading as J. W. Eastland & Company; Guy Wheeler and T. K. Polley, copartners trading as Emmett, Wheeler & Polley; E. H. Kuenster, surviving partner of co-
partnership of Erwin & Kuenster; Evans, Snider, Buel
297 Company, a corporation organized and existing under
the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Filler Wilson & McClelland, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; O. D. Freeland and C. M. Godfrey, copartners trading as Freeland & Godfrey; Fred Freeman, an individual trading as Fred Freeman & Company; P. J. Fitzgerald and G. S. Freeman, copartners trading as Freeman, Fitzgerald & Company; Wm. Gentleman, A. M. Gentleman, C. F. Gentleman and G. J. Gentleman, copartners trading as Wm. Gentleman & Sons; S. G. Gillogly, R. E. Gillogly, F. D. Gillogly and F. T. Gillogly, copartners trading as Gillogly & Company; Chas. E. Harding, trading as Chas. E. Harding & Company; Hefner Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Geo. F. Hogan, trading as Geo. F. Hogan & Company; A. Warheimer, E. H. Ingwerson, J. H. Ingwerson, Dan R. Ingwerson, D. C. Mosier and A. C. Barroff, copartners trading as Ingwerson Bros.; Iowa Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; I. W. Knettle and Edwin Knettle, copartners trading as Knettle Bros.; Knollin Sheep Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; E. H. Kuenster, an individual trading as Kuenster Livestock Commission Company; A. J. Laberthe; L. S. Larrison, an

individual trading as L. S. Larrison and Company; Lee Live Stock Commission Company, a corporation organized and
298 existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; F. C. Ludeman, an individual trading as F. C. Ludeman & Company; McCausland, Hoag & Vaughn, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Wm. Mahoney; J. P. Maley and Harry L. Carpenter, copartners trading as Maley, Carpenter & Company; John P. Martin, James G. Martin, George E. Martin and Wm. S. Burmister, copartners trading as Martin Bros. & Company; Miller White & Woods, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; P. T. Dolan, trading as Miller & Dolan; Frank R. Mullen, trading as Mullen Commission Company; Robert S. Murray, trading as Murray & McDowell; B. F. Hubbird, trading as Minteer Hubbird & Company; National Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Northwestern Livestock Commission, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; G. W. Nixon, C. S. Horn and W. H. Chisholm, copartners trading as Nixon, Horn & Chisholm; North American Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Silas Palmer and W. H. Palmer, copartners trading as Silas Palmer & Son; T. B. Vincent and C. H. Boothroyd, copartners trading as Paris Commission Company; W. C. Patterson, trading as John Patterson & Son; W. A. Peterson and Wm. Turnbull, copartners trading as Peterson, Turnbull & Company; J. H. Piatt, trading as
299 Abner Piatt & Company; Thos. K. Polley, trading as Thos. K. Polley & Company; R. H. Pritchard, trading as Pritchard Commission Company; Chas. R. Rice and Oscar A. Rice, copartners trading as Rice Bros.; J. B. Roach and W. P. Roach, copartners trading as Roach Livestock Commission Company; Rosenbaum Brothers & Company, a corporation organized and existing under the laws of the State of Illinois with its prnicipal place of business at Chicago in the State of Illinois; F. W. Sheldon trading as F. W. Sheldon

& Company; W. Harry Sherwood and Russell H. Sherwood, copartners trading as Sherwood & Son; J. Paul Shinn, Chas. H. Moberly and I. O. Fry, copartners trading as Shinn, Fry & Moberly, successors to Shinn Fry & Company; James G. Shutter; W. R. Smith, J. C. Eastes and John Smith, copartners trading as W. R. Smith & Son; T. B. Stafford and A. B. Stafford, copartners trading as Stafford Bros.; Standard Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; A. F. Starrett, Jr., O. A. Mathison, A. C. Granger and M. E. Peschong, copartners trading as Starrett, Mathison & Company; Chas. H. Stephens and J. A. Goble, copartners trading as Stephens & Goble; A. F. Stewart, trading as A. F. Stewart & Company; J. E. Strader and J. L. Strader, copartners trading as Strader Bros.; J. J. Sullivan and J. C. Sullivan, copartners trading as Sullivan Commission Company; A. Gilmore, C. L. Swanson and C. J. Castenholz, copartners trading as Swanson, Gilmore and Castenholz; Harry Thompson and C. N. Ball, copartners trading as Thompson & Ball; Thos. Tipton, E. M. Steck and W. P. Herrick, copartners trading as Tipton, Steck & Herrick; D. L. Trout and F. L. Trout, copartners trading as Trout Livestock Commission Company;

G. B. Van Norman, an individual trading as G. B. Van
300 Norman & Company; Van Norman Lawler & Company,

a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; W. H. Walter, trading as Walter Bros.; A. A. Walters, C. A. Dunbar and J. H. Dunbar, copartners trading as Walter & Dunbar; L. B. Werden; W. W. Wilson and Chas. A. Wilson, copartners trading as W. W. Wilson & Company; Jet Wimp, trading as Jet Wimp & Company; Kay Wood and Chas. A. Wood, copartners trading as Wood Bros.; Curtis A. Wood and Walter R. Wood, copartners trading as Curtis A. Wood & Company; L. B. Yancey; and W. E. Young, trading as W. E. Young & Company, by Sims Godman Stransky & Brewer, their attorneys, in connection with their appeal and say that in the record, proceedings, orders, and in the judgment herein grave and manifest error has intervened to the prejudice of the plaintiffs-appellants, in this to-wit:

1. The District Court erred in granting the motion of the defendant The Union Stock Yard & Transit Company for a directed verdict in its favor at the close of all of the evidence.

2. The District Court erred in granting the motion of the defendant Andrew W. Mellon, Director General of Railroads, as Agent, for a directed verdict in his favor at the close of all of the evidence.

3. The District Court erred in instructing the jury to find the issues in favor of the defendant The Union Stock Yard & Transit Company and against the plaintiffs.

4. The District Court erred in instructing the jury
301 to find the issues in favor of the defendant Andrew W. Mellon, Director General of Railroads, as Agent, and against the plaintiffs.

5. The District Court erred in instructing the jury to find the issues in favor of defendants and against the plaintiffs.

6. The verdict of the jury was contrary to law.

7. The verdict of the jury was contrary to the evidence.

8. The District Court erred in denying the motion of the plaintiffs for a new trial.

9. The District Court erred in denying the motion of the plaintiffs in arrest of judgment.

10. The District Court erred in entering judgment on the verdict.

11. The judgment was contrary to law and to the evidence.

12. The District Court erred in overruling the motions of the plaintiffs to revoke and set aside

(a) the court's order denying plaintiffs' motion for a new trial;

(b) the court's order denying plaintiffs' motion in arrest of judgment;

(c) the court's order entering judgment on the verdict.

13. The District Court erred in overruling the
302 motion of the plaintiffs to amend their original petition in said cause.

14. The District Court erred in entering judgment against the plaintiffs for costs.

15. The District Court erred in holding that plaintiffs were not entitled to recover the reparations awarded by the Interstate Commerce Commission to them, and in holding that the Interstate Commerce Commission had no authority to enter such order of reparations, and in holding that only the shippers of livestock were entitled to recover reparations in their own right, and that the order of reparations granted

plaintiffs herein was unenforceable in said District Court on their behalf.

16. The District Court erred in holding that plaintiffs as livestock commission men and factors were without authority to maintain a suit in the said District Court and to recover upon the reparations award of the Interstate Commerce Commission in their favor individually and as such factors, and in directing the jury to return a verdict in favor of the defendants and each of them and against the plaintiffs.

17. The District Court erred in sustaining the motion of the defendants to strike out the following testimony of Henry R. Park, a witness called and sworn on behalf of the 303 plaintiffs, as follows:

Mr. Godman: Q. Did you compile a record or a statement showing the car numbers, the dates of delivery, the contents of the car, the date of shipment and so on, for presentation to the Interstate Commerce Commission, in 9977 and 12514?

A. I did, yes, sir.

Q. And was such a statement filed with the Commission?

A. It was, yes, sir.

Q. From what did you make that statement up?

A. From the original records of the Commission firms, wherein their records are kept, showing the amount of freight charges and the different items paid to the Stock Yards companies on these shipments.

Q. What was the aggregate total paid by the plaintiffs in this cause to the Union Stock Yards & Transit Co., or the Director General of Railroads, if you know, or either of them, for this loading and unloading service?

Mr. Towner: I object to the question, if the court please, on the ground that that knowledge of the witness is secondary, based upon records concerning which there has been no testimony, and they are not produced here, and consequently it is hearsay.

Mr. McLaughlin: We join in that objection.

The Court: I think it is subject to that objection, and I will sustain the objection.

Mr. Godman: You gentlemen have here the records of the Interstate Commerce Commission, have you?

Mr. Towner: I might add, if your honor please, and not intending to interfere with Mr. Godman's examination, but for the purpose of clarity, we have present—I say we—the defendants have present in this court a complete record be-

fore the Interstate Commerce Commission, which includes
304 the documents that I assume Mr. Park has just under-
taken to testify about, and it is our intention to offer them in evidence, after the plaintiffs rest.

Mr. Godman: Well, I will offer that statement now, if you gentlemen will produce it.

Mr. McLaughlin: Well, it is Adams' Exhibit 1-A, isn't it, Mr. Park?

The Court: That is a good way to get at it.

Mr. Towner: Let me ask Mr. Park one question:

Q. This statement you have just testified about, Mr. Park, is that the statement that was introduced in the hearings before the Commission upon the hearing of October 3, 1922, and which was marked by the Commission Exhibit 1-A, was it not?

The Witness: Yes, sir.

Mr. Towner: Q. And you have turned over to me a copy of that exhibit, haven't you?

Mr. Park: I have.

Mr. Towner: Q. And is contained in that coffin-like box over there, isn't it?

A. It is.

Mr. Towner: Q. That is available for introduction if you wish.

Mr. Godman: If you will produce it.

Mr. Towner: Well, there it is.

Mr. Godman: You raised the objection; I was trying to get at this in a short way, but you want the statement in, and let us put it in.

Mr. Towner: I am not introducing this. I understood Mr. Godman wished to put it in, and if he does, there it is available for introduction by him.

Mr. Godman: May I have have it?

Mr. Towner: Sure.

305 Mr. Godman: I have never had the box.

Mr. McLaughin: The keys to the box, your witness has the key to the box. We simply have possession of the box.

Mr. Godman: You have the box and we have the keys.

Mr. Towner: The Stock Yards Company furnished the box and lock, and Mr. Park furnished the exhibit.

Mr. McLaughlin: And kept the keys.

Mr. Towner: And then the exhibit was deposited in the box, and the lock was locked, and Mr. Park has the key.

Mr. Godman: I will ask the witness to get the statements; if you are insisting upon your technical objection; that is the only way I can offer it.

Mr. Towner: Very well.

Mr. Godman: Will you get it, Mr. Park?

The Witness: With the help of another man.

Mr. McLaughlin: We will help you.

Mr. Godman: You raised the objection, and I am not to be criticized for putting it in. I wanted to get a summary of that entire matter.

The Witness: Here they are (indicating).

Mr. Godman: Are those the statements which you prepared, Mr. Park?

A. Yes, sir.

Q. All of them?

A. Yes, sir.

Q. You are familiar with those statements?

A. Yes, sir.

Q. And have first-hand knowledge of them?

A. Yes, sir.

Q. State, if you please, Mr. Park, how many carloads of shipments are accounted for in this chest, which you have now identified as Exhibit 1-A, which was before the Interstate Commerce Commission?

306 Mr. Towner: Now, if your honor please, I have an objection to that. The objection is this: That this document was introduced in the hearings before the Commission; the Yards company made very strenuous objection to it on account of its incompetency, on the ground that it had not been properly proven, on the ground that the records upon which it was based were not records of the Yards Company, had not been produced, nor had they been identified by any witness who had knowledge of the facts. That objection before the Commission was overruled, and the fact that it was overruled forms one ground of attack which we propose to make upon the Commission's order. The witness is now asked to testify, upon the same faulty premise, to the same conclusion, that the Commission permitted him to testify in the hearings before it. We have the same objection to the evidence that was had before the Commission, namely, that the witness has no personal knowledge of the facts; that his evidence is based upon records which have not been proven, nor produced; that it is secondary evidence, and it is hearsay, and is not competent to bind my client.

Mr. McLaughlin: We object, on the further ground that the document itself has not yet been offered in evidence, and therefore it is improper to show the compilations or the result of the figures contained in that document until after the document has been offered in evidence.

Mr. Godman: The question I am asking the witness is merely to state whether he knows how many carloads of shipments were involved in this hearing before the Interstate Commerce Commission, where these plaintiffs were awarded a reparation, just the number of carloads, if he knows; he is the Traffic Manager there.

Mr. Towner: That question, however, your honor, if
307 that is what the question is, I thought it went further than that—

Mr. Godman: Then I will withdraw that and ask that question.

Mr. Towner: That does not cure the objection because the witness' knowledge of the facts, even as testified to by him, rests, as I say, upon an examination of the records of the multitudinous Commission men's records which have not been produced, either here or before the Commission, concerning which there is no testimony. Mr. Park might testify as to what these records show, but even if he did that it could have no legal effect in the absence of some identification and proof as to the correctness of the record. I therefore make the same objection upon the same grounds.

Mr. McLaughlin: And I join in it.

The Court: I will overrule the objection.

Mr. Towner: Exception.

The Court: He may answer.

Mr. Godman: You may state.

The Witness: A. 560005 cars.

Mr. Godman: Q. Did you compute the aggregate amount of the loadings and unloading service charge which was made on that number of carload shipments?

A. That is, I assume, Mr. Godman, you mean over and above the tariff amount?

Q. Yes, the excess charge.

A. In other words, the excess charges?

Q. Yes.

A. Yes, sir. That is 140—

Q. I asked you if you had computed them?

A. I have, yes, sir.

Q. State what they amounted to?

Mr. Towner: I object to the question on the same
308 ground that I objected to the previous question, namely, it is based upon the witness' knowledge, not shown to be based on evidence, not proven, not produced, secondary, hearsay, and not competent to bind my client.

The Court: Overruled.

Mr. Towner: Exception.

The Witness: A. $140,001.25.

* * * * * *

Mr. McLaughlin: Q. You did not deliver the document that is in this frame box to the Commission in February, 1921, did you?

A. I did turn over to the Commission a copy of it.

Q. I am not asking that; I will ask to strike out the answer.

Mr. Hillyer: You mean the original?

The Witness: That is what I mean by the copy, that is a copy of the original that was turned over to the Commission, was delivered to the Commission physically by me on February 25th, 1921.

The Court: These are not the identical documents that you turned over?

The Witness: No, sir, they are the carbon copies of the original documents.

Mr. McLaughlin: Q. You did not commence the performance of your duties until some time in 1919?

A. May 1st, 1919.

Q. And you had nothing to do with the handling of any of this stock, or the payment of any of these charges, did you, personally?

A. As a Traffic Manager, I had, and every one of these individual commission firms at the Yards, it was my duty to
309 watch the payment of their freight charges, to see that the correct amount was paid, and no more, and to see that they were paid, and therefore, Mr. McLaughlin, it was my duty to go into the Commission firms' offices from time to time, and go into all of them, and examine their original records over a period back two years prior to the time that I assumed the position of Traffic Manager of the Exchange, because of the fact it was possible to file overcharge claims, or make refunds to carriers for that period previous to the two years that I assumed this position, and therefore I want to say to you that I was intimately acquainted with the records in the Commission firms' offices.

Q. My question was you had nothing personal to do with the handling or paying of these carloads of stock?

A. If you assume that from the answers I have given you, you are wholly mistaken because I did have personal contact with them, yes sir.

Q. What did you do with reference to receiving any carloads of this stock?

(No response.)

Q. If you did have anything to do with receiving any carloads, tell the jury about it?

A. I have just stated that as Traffic Manager for these Commission firms it was my duty, and I did inspect their records.

Q. What did you do in the performance of your duty in receiving any carloads of stock. Take one thing at a time?

A. Checked their freight records, their payment of freight charges, to see that they were proper.

Q. That did not have anything to do with receiving carloads of stock?

A. I never unloaded any of the stock.

Q. You were not there to see it unloaded?

310 A. Yes, I have seen them unloaded, thousands and thousands of carloads of stock.

Q. But without paying particular attention to what Commission man's stock it was or what shipper's stock?

A. I would not say that, but I will say this, and it may suit your purpose, I have never kept a record of each car, say 77642, unloaded.

Q. That is not my purpose. You misconceived it entirely. I want to know whether or not what you are testifying to about is something you gleaned from looking at the records of Commission men, or in some other way?

A. It is taken from actual contact, in watching them unload stock, seeing how they unloaded, how they handled it, following the bills through the Stock Yard Company offices, through the joint agency offices, personally, into the Commission firms' offices, and there seeing them paid.

Q. How many of the bills did you so follow?

A. Oh, a very small percentage of the aggregate, necessarily.

Q. You did not follow this 540,005, did you?

A. 560,000 cars, no, sir.

Q. And you did not pay any of this money over, did you?

A. Not personally, no; I O. K.'d the payment of them.

Q. You did not see any of the money paid over, did you?
A. Yes, I saw the checks, and approved the payments of a great quantity of them.
Q. Great quantities of them?
A. Yes, sir.
Q. As a rule, doesn't the Commission man check the bill, and after getting the weight of the stock and making allowances for the fill, doesn't he put the weight to be charged as freight down on the bill and compute the amount of the freight rate, and then doesn't he pay that bill, and it comes back
311 to you, without consulting you, as a rule?
A. In a vast majority of cases he does that, but he consults me on a certain percentage of them.
Q. If he is in doubt about the matter, and needs expert advice, then he consults you?
A. That is about the situation.
Q. The routine is that the Commission man helps make out that bill by adding the correct weight and computing the amount of the freight that will be chargeable, and returns it to the Stock Yards Company or the railroad, and by and by that same document comes back to him, and he pays the bill by writing his check?
A. That is right.
Q. And you as a rule have nothing to do with it?
A. I would say I do have something to do with it, because I am charged with the responsibility of seeing that these payments are correct.
Q. Yes, but you do not see one in a thousand of them, do you?
A. Yes, I see one out of a thousand and more than that, but I don't know what percentage I see. I watch them in a general way, and see that the correct amount of the freight charges are paid.
Q. So that in a large measure, all of this information that you gathered together and put in this document you call Exhibit 1-A was material that you got looking at the bills and the records of the Commission men?
A. Yes, sir, and from their check stubs.
Q. And the check stubs?
A. Yes, sir, that is correct.
312 18. The District Court erred in admitting in evidence over the objection and exception of the plaintiffs paragraphs 12 to 25 inclusive of Defendants' Exhibit 1, being a stipulation of certain facts entered into between the plaintiffs

and defendants with the right reserved by all parties to object to the competency, materiality and relevancy of any of said stipulation, said paragraphs 12 to 25 being as follows:

(12) That prior to the said period of Federal control of railroads, R. N. Collyer, as the duly authorized and appointed agent of the line-haul carriers, engaged in the transportation of livestock between the said Union Stock Yards and points east of Chicago, Illinois, published his official Classification No. 44, providing general regulations, form of contract, and terms and conditions for said transportation by said line-haul carriers, which was duly filed with the Interstate Commerce Commission under I. C. C. O. C. No. 44 and became effective February 1, 1917.

(13) That at noon, December 28, 1917, the Director General of Railroads took over the lines of railroads of the said line-haul carriers which engaged in the transportation of livestock between the said Union Stock Yards and points east of Chicago, Illinois, and continued in effect the said Official Classification No. 44.

(14) That during the said period of Federal control of railroads the Director General of Railroads published two supplements to said Official Classification No. 44, which in
313 form and substance carried forward and continued in force during the said period of Federal control of railroads, except as hereinafter indicated, the general regulations, form of contract, and terms and conditions for the transportation of livestock between the said Union Stock Yards and points east of Chicago, Illinois, as contained in said Official Classification, which supplements were filed with the Interstate Commerce Commission under I. C. C. Nos. 20 and 29, and became effective January 1, 1918, and September 30, 1918, respectively.

(15) That copies of the pages of said Official Classification No. 44, viz., title page, and pages xxi, lxiii, lxiv, 1, 30, 48, 49, 220, 221, 222, 223, and 224; of title page and pages 3, 4 and 5 of said supplement No. 20 thereto; and of title page and pages 17, 18 and 19 of said Supplement No. 29 thereto, which have been duly certified by George B. McGinty, Secretary of the Interstate Commerce Commission, are attached hereto, made a part hereof, and numbered Exhibit 3.

(16) That prior to the said period of Federal control of railroads, R. C. Fyfe, as the duly authorized and appointed agent of the line-haul carriers, engaged in the transportation of livestock to the said Union Stock Yards from points west

of Chicago, Illinois, published his Western Classification No. 54 providing certain regulations and terms and conditions for the said transportation by said line-haul carriers, which was duly filed with the Interstate Commerce Commission under I. C. C. No. 12 and became effective September 1, 1916.

(17) That at noon December 28, 1917, the Director General of Railroads took over the lines of railroads engaged in the transportation of livestock to the said Union Stock
314 Yards from points west of Chicago, Illinois, and continued in effect the said Western Classification No. 54.

(18) That copies of the pages of said Western Classification No. 54, viz., title page and pages i, lix, and 249, which have been duly certified by George B. McGinty, Secretary of the Interstate Commerce Commission, are attached hereto, made a part hereof, and numbered Exhibit 4.

(19) That during the said period of Federal control of railroads the Director General of Railroads published Western Classification No. 55, and Supplement No. 1 thereto, which in form and substance carried forward and continued in force during the said period of Federal control of railroads, except as hereinafter indicated, certain regulations and terms and conditions for the transportation of livestock to the said Union Stock Yards from points west of Chicago, Illinois, as contained in Western Classification No. 54, which classification and Supplement No. 1 were duly filed with the Interstate Commerce Commission under I. C. C. No. 13 and Supplement No. 1, and became effective April 1, 1918, and April 20, 1918, respectively.

(20) That copies of the pages of said Western Classification No. 55, viz., title page and pages i, xiii, lxi, and 282; and of title page and pages 4 and 21 of said Supplement 1 thereto, which have been duly certified by George B. McGinty, Secretary of the Interstate Commerce Commission, are attached hereto, made a part hereof, and numbered Exhibit 5.

(21) That during the period of Federal control of railroads the Director General of Railroads published Consolidated Freight Classification No. 1, consolidating and superseding the aforementioned Official Classification No. 44,
315 and Western Classification No. 55, and contained in form and substance certain regulations, form of contract, and terms and conditions for the transportation of livestock between the said Union Stock Yards and points east of Chicago, Illinois, as contained in Official Classification No. 44; and also containing in form and substance certain regulations

and terms and conditions for the transportation of livestock to the said Union Stock Yards from points west of Chicago, Illinois, as contained in said Western Classification No. 55, which Freight Classification No. 1 was duly filed with the Interstate Commerce Commission under I. C. C.-O. C. No. 45 and I. C. C. No. 14, and became effective December 30, 1919, and continued in full force and effect during the remainder of said period of Federal control of railroads.

(22) That copies of the pages of said Consolidated Freight Classification No. 1, viz., title page and pages ii, xxxv, lxxxix, 47, 48, 246 and 250, which have been duly certified by George B. McGinty, Secretary of the Interstate Commerce Commission, are attached hereto, made a part hereof, and numbered Exhibit 6.

(23) That prior to the said period of Federal control of railroads, E. B. Boyd, as the duly authorized and appointed agent of the line-haul carriers engaged in the transportation of livestock between the said Union Stock Yards and points within the State of Illinois, published his Illinois Classification No. 10-B providing certain regulations and terms and conditions for said transportation by said line-haul carriers, which Illinois Classification was filed with the Interstate Commerce Commission under I. C. C. No. A-658, and became effective May 25, 1916.

316 (24) That at noon December 28, 1917, the Director General of Railroads took over the lines of railroads of said line-haul carriers which engaged in the transportation of livestock between the said Union Stock Yards and points within the State of Illinois, and continued in effect the said Illinois Classification I. C. C. No. A-658.

(25) That copies of the pages of said Illinois Classification I. C. C. No. A-658, viz., title page and pages iii, iv, and 5, which have been duly certified by George B. McGinty, Secretary of the Interstate Commerce Commission, are attached hereto, made a part hereof, and numbered Exhibit 7.

* * * * * *

Wherefore, the aforesaid plaintiffs-appellants pray that the judgment of the said District Court be reversed.

SIMS, GODMAN, STRANSKY & BREWER
Attorneys for Plaintiffs-Appellants.

282 And on, to wit, the 22nd day of September, 1930 come Filed Sep 1930.
Geo. J. Adams and A. W. Kitchen, co-partners trading as Adams & Kitchen, et al., as principal and Hartford Accident & Indemnity Company, a corporation, as surety, and filed in the Clerk's office of said Court, in said entitled cause, a certain Bond on Appeal in words and figures following, to wit:

283 Know All Men By These Presents, that we, Geo. J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen; John G. Adler and Alfred E. Adler, copartners trading as Adler Sons & Company; Alexander, Conover and Martin, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; John A. Babcock, an individual trading as John A. Babcock & Company; Fred L. Heyne and E. H. Baker, copartners trading as Baker, Heyne & Company; W. A. Peterson, trading as Bacon, Peterson & Company; Bowles Live Stock Commission Company, a corporation organized and existing under the laws of the State of West Virginia with its principal place of business at Chicago in the State of Illinois; E. C. Brown and Seth B. St. John, copartners trading as Brown-St. John Company; Thos. H. Brown; George M. Brownson and J. L. Ettlinger, copartners trading as Brownson & Ettlinger; Byers Brothers Company, a corporation organized and existing under the laws of the State of Missouri with its principal place of business at Chicago in the State of Illinois; Wm. B. Swiney, Chas. M. Swiney and Thos. E. Swiney, copartners trading as Swiney Bros., successors to Bunker & Swiney; J. B. Cahill, trading as J. B. Cahill & Company; Central Live Stock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Ernest Clark and Louis Armbrecht, copartners trading as Clark, Armbrecht & Company; E. A. Clark, trading as Clark, Bowles & Company; John Clay, John G. Forrest, C. A. Kleman, F. H. Connor and C. L. Robinson, copartners trading as Clay, Robinson & Company; James R. Clegg, an individual trading as James R. Clegg & Company; A. M. Henneberry and
284 N. W. Cochran, copartners trading as Cochran & Henneberry; W. P. Collings, trading as W. P. Collings & Son; Conklin Bros. Commission Company, a corporation organ-

ized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; H. D. Copeland & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; J. M. Corrick; J. F. Cross and H. G. Sommers, copartners trading as Cross, Sommers & Company; A. B. Daniels; P. T. Dolan and Fred Ludeman, copartners trading as Dolan & Ludeman; J. M. Doud & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; S. S. Driver, an individual trading as S. S. Driver & Company; Chas. R. Beason and P. E. Moore, copartners trading as Drovers Commission Company; J. W. Eastland, an individual trading as J. W. Eastland & Company; Guy Wheeler and T. K. Polley, copartners trading as Emmett, Wheeler & Polley; E. H. Kuenster, surviving partner of copartnership of Erwin & Kuenster; Evans, Snider, Buel Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Filler Wilson & McClelland, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; O. D. Freeland and C. M. Godfrey, copartners trading as Freeland & Godfrey; Fred Freeman, an individual trading as Fred Freeman & Company; P. J. Fitzgerald and G. S. Freeman, copartners trading as Freeman, Fitzgerald & Company; Wm. Gentleman, A. M. Gentleman, C. F. Gentleman and G. J. Gentleman, copartners trading as Wm. Gentleman & Sons; S. G. Gillogly, R. E.
Gillogly, F. D. Gillogly and F. T. Gillogly, copartners
285 trading as Gillogly & Company; Chas. E. Harding,
trading as Chas. E. Harding & Company; Hefner Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Geo. F. Hogan, trading as Geo. F. Hogan & Company; A. Warheimer, E. H. Ingwerson, J. H. Ingwerson, Dan R. Ingwerson, D. C. Mosier and A. C. Barroff, copartners trading as Ingwerson Bros.; Iowa Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; I. W. Knettle and Edwin Knettle, copartners trading as Knettle Bros.; Knollin Sheep Commission Company, a cor-

poration organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; E. H. Kuenster, an individual trading as Kuenster Livestock Commission Company; A. J. Laberthe; L. S. Larrison, an individual trading as L. S. Larrison and Company; Lee Live Stock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; F. C. Ludeman, an individual trading as F. C. Ludeman & Company; McCausland, Hoag & Vaughn, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Wm. Mahoney; J. P. Maley and Harry L. Carpenter, copartners trading as Maley, Carpenter & Company; John P. Martin, James G. Martin, George E. Martin and Wm. S. Burmister, copartners trading as Martin Bros. & Company; Miller White & Woods, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in
286 the State of Illinois; P. T. Dolan, trading as Miller & Dolan; Frank R. Mullen, trading as Mullen Commission Company; Robert S. Murray, trading as Murray & McDowell; B. F. Hubbird, trading as Minteer Hubbird & Company; National Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Northwestern Livestock Commission, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; G. W. Nixon, C. S. Horn and W. H. Chisholm, copartners trading as Nixon, Horn & Chisholm; North American Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Silas Palmer and W. H. Palmer, copartners trading as Silas Palmer & Son; T. B. Vincent and C. H. Boothroyd, copartners trading as Paris Commission Company; W. C. Patterson, trading as John Patterson & Son; W. A. Peterson and Wm. Turnbull, copartners trading as Peterson, Turnbull & Company; J. H. Piatt, trading as Abner Piatt & Company; Thos. K. Polley, trading as Thos. K. Polley & Company; R. H. Pritchard, trading as Pritchard Commission Company; Chas. R. Rice and Oscar A. Rice, copartners trading as Rice Bros.; J. B. Roach and W. P. Roach, co-

partners trading as Roach Livestock Commission Company; Rosenbaum Brothers & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; F. W. Sheldon trading as F. W. Sheldon & Company; W. Harry Sherwood and Russell H. Sherwood, copartners trading as Sherwood & Son; J. Paul Shinn, Chas. H.
287 Moberly and I. O. Fry, copartners trading as Shinn, Fry & Moberly, successors to Shinn Fry & Company; James G. Shutter; W. R. Smith, J. C. Eastes and John Smith, copartners trading as W. R. Smith & Son; T. B. Stafford and A. B. Stafford, copartners trading as Stafford Bros.; Standard Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; A. F. Starrett, Jr., O. A. Mathison, A. C. Granger and M. E. Peschong, copartners trading as Starrett, Mathison & Company; Chas. H. Stephens and J. A. Goble, copartners trading as Stephens & Goble; A. F. Stewart, trading as A. F. Stewart & Company; J. E. Strader and J. L. Strader, copartners trading as Strader Bros.; J. J. Sullivan and J. C. Sullivan, copartners trading as Sullivan Commission Company; A. Gilmore, C. L. Swanson and C. J. Castenholz, copartners trading as Swanson, Gilmore and Castenholz; Harry Thompson and C. W. Ball, copartners trading as Thompson & Ball; Thos. Tipton, E. M. Steck and W. P. Herrick, copartners trading as Tipton, Steck & Herrick; D. L. Trout and F. L. Trout, copartners trading as Trout Livestock Commission Company; G. B. Van Norman, an individual trading as G. B. Van Norman & Company; Van Norman Lawler & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; W. H. Walter, trading as Walter Bros.; A. A. Walters, C. A. Dunbar and J. H. Dunbar, copartners trading as Walter & Dunbar; L. B. Werden; W. W. Wilson and Chas. A. Wilson, copartners trading as W. W. Wilson & Company; Jet Wimp, trading as Jet Wimp & Company; Kay Wood and Chas. A. Wood, copartners trading as Wood Bros.; Curtis A. Wood and Walter R. Wood, copartners trading as Curtis A. Wood & Company; L. B. Yancey, and W. E. Young, trading as W. E.
288 Young & Company, as principals, and Hartford Accident and Indemnity Company, a corporation, as surety, are held and firmly bound unto The Union Stock Yard & Transit

Company, a corporation, and Andrew W. Mellon, Director General of Railroads, as agent for the following corporations: The Atchison, Topeka & Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; The Chesapeake and Ohio Railway Company of Indiana; The Chicago and Alton Railroad Company; Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis & Louisville Railway Company; Chicago Junction Railway Company; Chicago, Milwaukee and St. Paul Railway Company, and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers; The Chicago, Rock Island and Pacific Railway Company; Chicago, Terre Haute & Southeastern Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Grand Trunk Western Railway Company; Illinois Central Railroad Company; Indiana Harbor Belt Railroad Company; The Michigan Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; New York Central Railroad Company; New York, Chicago & St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; The Toledo, St. Louis & Western Railroad Company, and J. Frank Johnson and Harry A. Dunn, Receivers, and Wabash Railway Company, their attorneys, executors, administrators or assigns, in the penal sum of Five Hundred Dollars ($500.00), to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly, severally and firmly by these presents.

289 Sealed with our seals and dated this 22nd day of September in the year of Our Lord one thousand nine hundred thirty.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, in a suit pending in said court between the first named principals as plaintiffs and the above-named obligees as defendants, a judgment for costs and in bar of action was rendered against the said above-named principals and the said above-named principals have obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and have filed a copy thereof in the

Clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said above-named obligees citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit to be holden at Chicago in the State of Illinois.

Now, The Condition Of The Above Obligation Is Such, that if the said above-named principals shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

W. W. Wilson & Co. (Seal)
By Chas. A. Wilson
Trout Live Stock Com. Co.
H. S. Trout *co-partner* (Seal)
Starrett, Mathison & Co.
per M. E. Ceschong (Seal)
Baker, Heyne & Co.
by Fred L. Heyne (Seal)
Gillogby & Company
by R. E. Gilloghy (Seal)
290 Thompson & Ball (Seal)
By H. E. Thompson (Seal)
Clark, Armbrecht & Co.
By Louis Armbrecht & Co. (Seal)
Mullen Com. Co.
By Frank R. Mullen (Seal)
Dolan & Ludeman
By P. T. Dolan (Seal)
Wm. Gentleman & Sons
By Wm. Gentlemen (Seal)
Swiney Brothers
By T. E. Swiney (Seal)
Stafford Bros.
By A. B. Stafford (Seal)
Martin Bros & Co.
By Geo. E. Martin (Seal)
Drovers Com. Co.
By P. E. Moore (Seal)
Walters & Dunbar
By J. H. Dunbar (Seal)
Clark, Bowles & Co.
By E. A. Clark (Seal)

SWANSON, GILMORE & CASTENHOLZ
By A. GILMORE (Seal)
MINTEER HUBBIRD & Co.
By B. F. HUBBIRD (Seal)
COCHRAN & HENNEBERRY
By A. M. HENNEBERRY (Seal)
JOHN A. BABCOCH & Co.
By JOHN A. BABCOCK (Seal)
RICE BROS.
By CHAS. R. RICE (Seal)
ERWIN & KUENSTER
By E. H. KUENSTER (Seal)
ROACH LIVESTOCK COM. Co.
By W. P. ROACH (Seal)
JET WIMP & Co.
By JET WIMP (Seal)
EMMETT, WHEELER & POLLEY
By T. K. POLLEY (Seal)
291
BROWNSON & ETTLINGER
By J. L. ETTLINGER (Seal)
(Seal)
ROSENBAUM BROS. & Co.
By A. MATHINSON
Pr. (Seal)
D. C. MOSIE
Sec.
BYERS BROS. Co.
By B. M. BYERS
Pres. (Seal)
By F. A. EMERY
V. Pr.
STRADER BROS.
By J. E. STRADER (Seal)
JOHN PATTERSON & SON
By W. C. PATTERSON (Seal)
SILAS PALMER & SON
By W. H. PALMER (Seal)
MALEY, CARPENTER & Co.
By HARRY L. CARPENTER (Seal)
BACON, PETERSON & Co.
By W. A. PETERSON (Seal)
PETERSON, TURNBULL & Co.
By W. A. PETERSON (Seal)
(Seal)
FRED FREEMAN & Co.
By FRED FREEMAN (Seal)

JAMES W. EASTLAND & Co.
By JAMES W. EASTLAND (Seal)
ALEXANDER, CONOVER & Co.
By J. W. CONOVER
Pres. (Seal)
GEORGE G. CONOVER
Treas. (Seal)
(Seal) ADLER SONS & Co. (Seal)
By JOHN G. ADLER (Seal)
HARTFORD ACCIDENT AND
INDEMNITY COMPANY (Seal)
By WARD W. HILTON
Attorney-in-fact (Seal)

Ins. Co. O. K.
CHRIS H. GUENTHER
Deputy

Approved:
CHARLES E. WOODWARD
District Judge

22. 292 And afterwards, to wit, on the 22nd day of September 1930, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge, appears the following entry, to wit:

293 * * (Caption) * *

Monday, September 22, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

This day come the plaintiffs by their attorneys and present herein the plaintiffs' cost bond which bond is approved and signed by the Court and ordered by the Court to be filed by the Clerk of this Court.

317 And afterwards, to wit, on the 22nd day of October, 1930, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

318 • • (Caption) • • Enter 193

Monday, September 22, 1930.

Present: Honorable Charles E. Woodward, Judge of said Court.

On motion of plaintiffs' attorney It Is Ordered that the time for docketing the appeal in the Circuit Court of Appeals be and the same is hereby extended to October 31, A. D. 1930.

604 • • (Caption) • • Filed 193

NOTICE.

To: Winston Strawn & Shaw,
38 South Dearborn Street,
Chicago, Illinois,
Attorneys for Union Stock Yard & Transit Company.
and
Edgar R. Hart,
1422-400 West Madison Street,
Chicago, Illinois,
Attorney for Director General of Railroads.

Please take notice that on Tuesday, October 14, 1930, we will file in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, the plaintiffs' amended praecipe for transcript of record in the above-entitled cause, a copy of said amended praecipe being herewith served upon you.

SIMS, GODMAN, STRANSKY & BREWER
Attorneys for Plaintiffs.

Received copy of the foregoing notice and amended praecipe for transcript of record this 14th day of October, A. D.
605 1930.

WINSTON, STRAWN & SHAW
Attorneys for Union Stock Yard & Transit Company.

EDGAR R. HART
by M. CARMODY
Attorney for Director General of Railroads.

606 • • (Caption) • •

AMENDED PRAECIPE FOR TRANSCRIPT OF RECORD.

To: Charles M. Bates, Esq.,
Clerk of said District Court.

In lieu of the plaintiffs' original praecipe heretofore filed herein you will please prepare a true and complete transcript of record in the above-entitled cause, to be filed with the Clerk of the United States Circuit Court of Appeals for the Seventh Judicial Circuit in accordance with the appeal granted to the plaintiffs herein and on behalf of said plaintiffs, and include therein the following and none other:

1. Placita.
2. Praecipe.
3. Security for costs.
4. Plaintiffs petition and exhibits A, B, C, D, and E attached thereto.
5. Appearance of Andrew W. Mellon, Director General of Railroads.
6. Appearance of Union Stock Yard & Transit Company.
7. Answer of Union Stock Yard & Transit Company.

607 8. Answer of Andrew W. Mellon, Director General of Railroads.

9. All orders of continuance.
10. Order impaneling the jury.
11. Motion of Andrew W. Mellon, Director General of Railroads, for directed verdict.
12. Motion of Union Stock Yard & Transit Company for directed verdict.
13. Opinion of Judge Woodward, January 28, 1930.
14. Order allowing motion for a directed verdict of Andrew W. Mellon, Director General of Railroads and exceptions thereto, January 28, 1930.
15. Order allowing motion for a directed verdict of Union Stock Yard & Transit Company and exceptions thereto, January 28, 1930.
16. Verdict of the jury, January 28, 1930, and exceptions thereto.
17. Motion of plaintiffs for new trial, order overruling same, and exception thereto, January 28, 1930.

18. Motion of plaintiffs in arrest of judgment, order overruling same, and exception thereto, January 28, 1930.
19. Judgment.
20. Petition for appeal and order of January 28, 1930 allowing appeal.
21. Motion of plaintiffs filed January 31, 1930 to vacate orders of January 28, 1930 overruling motion for new trial and motion in arrest of judgment, and affidavits in support thereof, and order of January 31, 1930 setting same.
22. Reasons assigned by plaintiffs in support of motion to vacate and set aside orders entered January 28, 1930, and motion to amend plaintiffs petition and amendment to plaintiffs petition all filed April 11, 1930.
23. Memorandum opinion of Judge Woodward filed July 31, 1930.
608 24. Order of July 31, 1930 overruling motion to vacate and set aside orders of January 28, 1930 overruling motion for new trial and motion in arrest of judgment and exception thereto by plaintiffs, order overruling motion to amend original petition exception thereto by plaintiffs, and extending time for filing bill of exceptions and appeal bond.
25. Order of August 28, 1930 amending order of July 31, 1930 allowing appeal and fixing time for bond and bill of exceptions.
26. Appeal bond.
27. Order of court approving appeal bond.
28. Bill of exceptions and order approving bill of exceptions.
29. Assignment of errors.
30. Citation.
31. Notice and Amended Praecipe for record.
32. Motion and order transmitting all original exhibits to Circuit Court of Appeals.
33. Order enlarging time for presenting, settling signing and filing bill of exceptions.
34. Order enlarging time for docketing appeal in Circuit Court of Appeals for the Seventh Circuit.

SIMS, GODMAN, STRANSKY & BREWER
Attorneys for Plaintiffs.

609 Northern District of Illinois, } ss:
Eastern Division, }

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled George J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen, et al vs. Andrew W. Mellon, Director General of Railroads, as Agent, et al No. 37517 as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 30th day of October, A. D. 1930.

CHARLES M. BATES,
Clerk.

(Seal)

610 United States of America, } ss:

The President of the United States

To The Union Stock Yard & Transit Company, a corporation, and Andrew W. Mellon, Director General of Railroads, as agent for the following corporations: The Atchison, Topeka & Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; The Chesapeake and Ohio Railway Company of Indiana; The Chicago and Alton Railroad Company; Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis & Louisville Railway Company; Chicago Junction Railway Company; Chicago, Milwaukee and St. Paul Railway Company, and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers; The Chicago, Rock Island and Pacific Railway Company; Chicago, Terre Haute & Southeastern Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Grand Trunk

Western Railway Company; Illinois Central Railroad Company; Indiana Harbor Belt Railroad Company; The Michigan Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; New York Central Railroad Company; New York, Chicago & St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; The Toledo, St. Louis & Western Railroad Company, and J. Frank Johnson and Harry A. Dunn, Receivers, and Wabash Railway Company,

Greeting:

You are hereby cited and admonished to be and appear 611 at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Geo. J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen; John G. Adler and Alfred E. Adler, copartners trading as Adler Sons & Company; Alexander, Conover and Martin, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; John A. Babcock, an individual trading as John A. Babcock & Company; Fred L. Heyne and E. H. Baker, copartners trading as Baker, Heyne & Company; W. A. Peterson, trading as Bacon, Peterson & Company; Bowles Live Stock Commission Company, a corporation organized and existing under the laws of the State of West Virginia with its principal place of business at Chicago in the State of Illinois; E. C. Brown and Seth B. St. John, copartners trading as Brown-St. John Company; Thos. H. Brown; George M. Brownson and J. L. Ettlinger, copartners trading as Brownson & Ettlinger; Byers Brothers Company, a corporation organized and existing under the laws of the State of Missouri with its principal place of business at Chicago in the State of Illinois; Wm. B. Swiney, Chas. M. Swiney and Thos. E. Swiney, copartners trading as Swiney Bros., successors to Bunker & Swiney; J. B. Cahill, trading as J. B. Cahill & Company; Central Live Stock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Ernest Clark and Louis Armbrecht, copartners trading as Clark, Armbrecht &

Company; E. A. Clark, trading as Clark, Bowles & Company; John Clay, John G. Forrest, C. A. Kleman, F. H.
612 Connor and C. L. Robinson, copartners trading as Clay, Robinson & Company; James R. Clegg, an individual trading as James R. Clegg & Company; A. M. Henneberry and N. W. Cochran, copartners trading as Cochran & Henneberry; W. P. Collings, trading as W. P. Collings & Son; Conklin Bros. Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; H. D. Copeland & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; J. M. Corrick; J. F. Cross and H. G. Sommers, copartners trading as Cross, Sommers & Company; A. B. Daniels; P. T. Dolan and Fred Ludeman, copartners trading as Dolan & Ludeman; J. M. Doud & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; S. S. Driver, an individual trading as S. S. Driver & Company; Chas. R. Beason and P. E. Moroe, copartners trading as Drovers Commission Company; J. W. Eastland, an individual trading as J. W. Eastland & Company; Guy Wheeler and T. K. Polley, copartners trading as Emmett, Wheeler & Polley; E. H. Kuenster, surviving partner of copartnership of Erwin & Kuenster; Evans, Snider, Buel Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Filler Wilson & McClelland, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; O. D. Freeland and C. M. Godfrey, copartners trading as Freeland & Godfred; Fred Freeman, an individual trading as Fred Freeman & Company; P. J. Fitzgerald and G. S. Freeman, copartners trading as Freeman, Fitzgerald &
613 Company; Wm. Gentleman, A. M. Gentleman, C. F. Gentleman and G. J. Gentleman, copartners trading as Wm. Gentleman & Sons; S. G. Gillogly, R. E. Gillogly, F. D. Gillogly and F. T. Gillogly, copartners trading as Gillogly & Company; Chas. E. Harding, trading as Chas. E. Harding & Company; Hefner Commision Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Geo. F. Hogan, trading as Geo. F. Hogan & Company;

A. Warheimer, E. H. Ingwerson, J. H. Ingwerson, Dan R. Ingwerson, D. C. Mosier and A. C. Barroff, copartners trading as Ingwerson Bros.; Iowa Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; I. W. Knettle and Edwin Knettle, copartners trading as Knettle Bros.; Knollin Sheep Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; E. H. Kuenster, an individual trading as Kuenster Livestock Commission Company; A. J. Laberthe; L. S. Larrison, an individual trading as L. S. Larrison and Company; Lee Live Stock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; F. C. Ludeman, an individual trading as F. C. Ludeman & Company; McCausland, Hoag & Vaughn, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Wm. Mahoney; J. P. Maley and Harry L. Carpenter, copartners trading as Maley, Carpenter & Company; John P. Martin, James G. Martin, George E. Martin and Wm. S. Burmister, copart-
614 ners trading as Martin Bros. & Company; Miller White & Woods, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; P. T. Dolan, trading as Miller & Dolan; Frank R. Mullen, trading as Mullen Commission Company; Robert S. Murray, trading as Murray & McDowell; B. F. Hubbird, trading as Minteer Hubbird & Company; National Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Northwestern Livestock Commission, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois, G. W. Nixon, C. S. Horn and W. H. Chisholm, copartners trading as Nixon, Horn & Chisholm; North American Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Silas Palmer and W. H. Palmer, copartners trading as Silas Palmer & Son; T. B. Vincent and C. H. Boothroyd, copart-

ners trading as Paris Commission Company; W. C. Patterson, trading as John Patterson & Son; W. A. Peterson and Wm. Turnbull, copartners trading as Peterson, Turnbull & Company; J. H. Piatt, trading as Abner Piatt & Company; Thos. K. Polley, trading as Thos. K. Polley & Company; R. H. Pritchard, trading as Pritchard Commission Company; Chas. R. Rice and Oscar A. Rice, copartners trading as Rice Bros.; J. B. Roach and W. P. Roach, copartners trading as Roach Livestock Commission Company; Rosenbaum Brothers & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; F. W. Sheldon trading as F. W. Sheldon & Company; W. Harry Sherwood and Russell H. Sherwood, copartners trading as Sherwood & Son;
615 J. Paul Shinn, Chas. H. Moberly and I. O. Fry, copartners trading as Shinn, Fry & Moberly, successors to Shinn Fry & Company; James G. Shutter; W. R. Smith, J. C. Eastes and John Smith, copartners trading as W. R. Smith & Son; T. B. Stafford and A. B. Stafford, copartners trading as Stafford Bros.; Standard Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; A. F. Starrett, Jr., O. A. Mathison, A. C. Granger and M. E. Peschong, copartners trading as Starrett, Mathison & Company; Chas H. Stephens and J. A. Goble, copartners trading as Stephens & Goble; A. F. Stewart, trading as A. F. Stewart & Company; J. E. Strader and J. L. Strader, copartners trading as Strader Bros.; J. J. Sullivan and J. C. Sullivan, copartners trading as Sullivan Commission Company; A. Gilmore, C. L. Swanson and C. J. Castenholz, copartners trading as Swanson, Gilmore and Castenholz; Harry Thompson and C. N. Ball, copartners trading as Thompson & Ball; Thos. Tipton, E. M. Steck and W. P. Herrick, copartners trading as Tipton, Steck & Herrick; D. L. Trout and F. L. Trout, copartners trading as Trout Livestock Commission Company; G. B. Van Norman, an individual trading as G. B. Van Norman & Company; Van Norman Lawler & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; W. H. Walter, trading as Walter Bros.; A. A. Walters, C. A. Dunbar and J. H. Dunbar, copartners trading as Walter & Dunzar; L. B. Werden; W. W. Wilson and Chas. A. Wilson, copartners trading as W. W. Wilson & Company;

Jet Wimp, trading as Jet Wimp & Company; Kay Wood and Chas. A. Wood, copartners trading as Wood Bros.; Curtis A. Wood and Walter R. Wood, copartners trading as Curtis A. Wood & Company; L. B. Yancey; and W. E. Young, trad-
616 ing as W. E. Young & Company, are plaintiffs-appellants and you are defendants-appellees, to show cause, if any there be, why the judgment rendered against the said plaintiffs-appellants as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles E. Woodward, Judge of the District Court of the United States, this 22d day of September, in the year of our Lord one thousand nine hundred and thirty.

CHARLES E. WOODWARD
District Judge.

617 On this ..... day of September, in the year of our Lord one thousand nine hundred and thirty, personally appeared .....
before me, the subscriber, ...
and makes oath that he delivered a true copy of the within citation to .....
Sworn to and subscribed the ..... day of September, A. D. 1930.

.....

Service of the within citation and receipt of copy thereof admitted this 24th day of September, 1930.

WINSTON, STRAWN & SHAW
Attorneys for The Union Stock Yard & Transit Company, Defendant-Appellee.

Service of the within citation and receipt of copy thereof admitted this 24th day of September, 1930.

EDGAR R. HART
Attorney for Andrew W. Mellon, Director General of Railroads, as Agent, Defendant-Appellee.

618 (Endorsed) * * (Caption) * * Citation Filed Sep 25 1930 Charles M. Bates, Clerk. Sims Godman Stransky & Brewer, Attorneys at Law, 1351 Continental Illinois Bank Building, Chicago, Ill. Telephone Central 4384.

Nov. 10,

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4462 October Term, 1930.

George J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen, *et al.*,
Appellants,

vs.

Union Stock Yard and Transit Company and Andrew W. Mellon, Director General of Railroads, as Agent, *et al.*,
Appellees.

STIPULATION.

It appearing that in the transcript of record in the above case the exhibits of the appellants, the plaintiffs below, appear in two places, to-wit, Exhibits A, B, C, D, E, and F are attached to the original petition filed in said case and appear in said transcript as a part of the common-law record, and also the same exhibits were offered and received in evidence and appear in the bill of exceptions as plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5 and 6;

It Is Therefore Stipulated and Agreed by and between the parties hereto, by their respective counsel, that the Clerk of the United States Circuit Court of Appeals in printing the transcript of record shall omit from the common-law record plaintiffs' Exhibits A, B, C, D, E and F but shall print as a part of the bill of exceptions the same exhibits which appear therein as plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5 and 6, and wherever said exhibits appear in the common-law record that in lieu of printing them they shall be appropriately referred to.

FRANKLIN J. STRANSKY;
CLAIR R. HILLYER and
JAMES P. CAREY, JR.
Counsel for Appellants.
WINSTON, STRAWN & SHAW
Counsel for Appellee Union Stock Yard and Transit Company.
A. A. MCLAUGHLIN
Counsel for Appellee Andrew W. Mellon, Director General of Railroads, as Agent.

(Filed November 10, 1930.)

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 378, inclusive, contain a true copy of the Printed Record, printed under my supervision and filed in the seventeenth day of January, 1931, and which, together with the original exhibits in this cause, certified herewith, constitute the record on which the following entitled cause was heard and determined:

George J. Adams and A. W. Kitchen, Co-partners Trading as Adams & Kitchen, *et al.*,

Appellants,

vs.

Andrew W. Mellon, Director General of Railroads, as Agent, The Union Stock Yard & Transit Company, *et al.*,

Appellees,

No. 4462, October Term, 1930, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 16th day of November, A. D. 1931.

(Seal)

FREDERICK G. CAMPBELL
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago in said Seventh Circuit on the seventh day of October, 1930, of the October Term in the year of our Lord one thousand nine hundred and thirty, and of our Independence the one hundred and fifty-fifth.

And afterwards, to wit: On the thirty-first day of October, 1930, there was filed in the office of the clerk of this Court, a Certificate to Exhibits, which said Certificate to Exhibits is in the words and figures following, to wit:

United States of America
Northern District of Illinois } ss.
Eastern Division

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify that I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, certain original exhibits in the case entitled Adams & Kitchen, et al. vs. Andrew W. Mellon, Director General of Railroads, as Agent, et al., No. 37517, said exhibits are marked as follows, to wit:

Defendant's Exhibits: 1, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45.

In Testimony Whereof: I have hereunto set my hand and affixed the seal of said Court at my office in the City of Chicago, this 30th day of October, 1930.

CHARLES M. BATES,
Clerk.

(Seal)

Endorsed: Filed Oct. 31, 1930. Edward M. Holloway, Clerk.

And on the same day, to wit: On the thirty-first day of October, 1931 there was filed in the office of the clerk of this Court an appearance of counsel for appellants, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4462 October Term, 1930.

George J. Adams and A. W. Kitchen, Co-partners trading as Adams & Kitchen, *et al.*

Appellants,

vs.

Andrew W. Mellon, Director General of Railroads, as Agent, The Union Stock Yards & Transit Company, *et al.*

Appellee.

The clerk will please enter our appearance as counsel for the appellants.

FRANKLIN J. STRANSKY
CLAIR R. HILLYER
JAMES P. CAREY, JR.
#1351, 230 South Clark Street,
Chicago, Illinois.

Endorsed: Filed Oct. 31, 1930. Edward M. Holloway, Clerk.

And afterwards, to wit: On the fourth day of November, 1930, there was filed in the office of the clerk of this Court an appearance of counsel for Appellee, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4462 October Term, 1930.

George J. Adams & A. W. Kitchen, Co-partners, etc.
Appellants.

vs.

Andrew W. Mellon, Director General of Railroads, *et al.*
Appellees.

The clerk will enter my appearance as counsel for the Appellee; A. W. Mellon, Director General.

A. A. McLAUGHLIN
No. 1115—Bankers Trust Bldg.
Des Moines, Iowa.

EDGAR R. HART
R. 1422—400 W. Madison St.
Chicago. Ill.

Endorsed: Filed Nov. 4, 1930. Edward M. Holloway, Clerk.

And on the same day, to wit: On the fourth day of November, 1930, there was filed in the office of the clerk of this Court an appearance of counsel for Appellee, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4462. October Term, 1930.

George J. Adams & A. W. Kitchen, Co-partners, etc.
Appellants.

vs.

Andrew W. Mellon, Director General of Railroads, *et al.*
Appellee.

The clerk will enter my appearance as counsel for the Aplee, Union Stock Yards & Transit Company.

SILAS H. STRAWN
RALPH M. SHAW
FRANK N. TOWNER
38 So. Dearborn Street
Chicago, Ill.

Endorsed: Filed Nov. 4, 1930. Edward M. Holloway, Clerk.

And afterwards, to wit: On the tenth day of November, 1930, there was filed in the office of the clerk of this Court a Stipulation re: printing transcript of record, which said Stipulation is not copied here as the same appears on page 378 of the Printed Record in this cause, certified herewith.

And afterwards, to wit: On the twenty-fourth day of January, 1931, there was filed in the office of the clerk of this Court an appearance of counsel for Appellee, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4462. October Term, 1930.

George J. Adams, *et al.*

vs.

A. W. Mellon, Director General, *et al.*

The clerk will enter my appearance as counsel for the Andrew W. Mellon, Director General of Railroads, as Agent.

SIDNEY F. ANDREWS
Hurley-Wright Building
Washington, D. C.

Endorsed: Filed Jan. 24, 1931. Edward M. Halloway, Clerk.

And afterwards, to wit: On the twenty-third day of March, 1931, there was filed in the office of the Clerk of this Court a Stipulation as to date of hearing, which said Stipulation is in the wards and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1930.

George J. Adams & A. W. Kitchen, Co-partners trading as Adams & Kitchen, *et al.*,
Appellants,
vs.
Andrew W. Mellon, Director General of Railroads, etc., *et al.*,
Appellees.
No. 4462.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto, by their counsel, that the Court may set the above entitled cause for argument on Thursday, May 7, 1931.

SIMS STRANSKY BREWER & POUST
C. R. HILLYER
Attorneys for Appellants.

SIDNEY F. ANDREWS
A. A. McLAUGHLIN
Attorneys for Appellee, Andrew W. Mellon, Director General of Railroads, etc.

SILAS H. STRAWN
RALPH M. SHAW
FRANK N. TOWNER
Attorneys for Appellee Union Stock Yard & Tranit Company of Chicago.

Endorsed: Filed March 23, 1931. Edward M. Holloway, Clerk.

And on the same day, to wit: On the twenty-third day of March, 1931, the following further proceedings were had and entered of record, to wit:

Monday, March 23, 1931.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding
Hon. Evan A. Evans, Circuit Judge
Hon. William M. Sparks, Circuit Judge
Edward M. Holloway, Clerk
Henry C. W. Laubenheimer, Marshal

Before:

Hon. Samuel Alschuler, Circuit Judge

4462	George J. Adams, *et al.* *vs.* Andrew W. Mellon, Director General of Railroads, *et al.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Pursuant to stipulation of counsel, it is now here ordered that this cause be, and the same is hereby set down for hearing on Thursday, May 7, 1931.

And afterwards, to wit: On the fourteenth day of May, 1931, the following further proceedings were had and entered of record, to wit:

Thursday, May 14, 1931.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding
Hon. Evan A. Evans, Circuit Judge
Hon. William M. Sparks, Circuit Judge
Hon. Walter C. Lindley, District Judge
Edward M. Holloway, Clerk
Henry C. W. Laubenheimer, Marshal

Before:

Hon. Samuel Alschuler, Circuit Judge
Hon. William M. Sparks, Circuit Judge
Hon. Walter C. Lindley, District Judge

George J. Adams, *et al.*
4462 *vs.*
Andrew W. Mellon, Director General of Railroads, as Agent, *et al.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Franklin J. Stransky, counsel for appellants, and by Mr. Sidney F. Andrews and Mr. A. A. McLaughlin, counsel for appellee Andrew W. Mellon, Director General of Railroads, as Agent, and by Mr. Frank H. Towner for appellee, Union Stock Yard and Transit Company.

And afterwards, to wit: On the twenty-seventh day of July, 1931, there was filed in the office of the clerk of this Court, the Opinion of the Court, which said Opnion is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4462. October Term, 1930, April Session, 1931.

George J. Adams & A. W. Kitchen, Copartners trading as Adams & Kitchen, *et al.*, *Appellants*, *vs.* Andrew W. Mellon, Director General of Railroads, etc., *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

July 27, 1931.

Before ALSCHULER, and SPARKS, *Circuit Judges*, and LINDLEY, *District Judge*.

ALSCHULER, *Circuit Judge*. The appeal is from a judgment of the District Court given in an action there brought to enforce an order for reparation awarded by the Interstate Commerce Commission against the Director General of Railroads and the United Stock Yard & Transit Co. in the sum of $140,001.25, with interest and attorneys' fees. The order for reparation was based on the collection of a charge of 25 cents per car for loading and unloading live stock at the Union Stock Yard in Chicago during the period of Federal control of the railroads. At the close of all the evidence the court, upon motions of defendants, directed the jury to return a verdict for defendants.

The Stock Yard Company was organized in 1865 to construct and operate stock yards, and railway tracks connecting the yards with the several railroads entering Chicago. Its capital stock was then held by or in the interest of the line-haul railroads. In 1867 the Stock Yard Co. established a charge of 50 cents for loading and 25 cents for unloading each car of live stock, which charge was assumed and paid by the

several line-haul railroads. The railroads moved the cars with their own power over the tracks of the Stock Yard Co. to its unloading platforms, and the stock was unloaded by the Stock Yard employes.

In 1894 the Stock Yard Co.'s tracks were transferred to the Chicago Junction Railway Co. A through tariff was then published by the railroads, which included a switching charge of $2 for each car moved between the termini of the railroads and the stock yard. Out of this charge grew a controversy as to whether the Stock Yard Co. was a common carrier engaged in interstate commerce, and subject to the provisions of the Act to Regulate Commerce. The Commission determined that it was such a common carrier. The controversy reached the Supreme Court on an appeal from the United States Commerce Court, and in 1912 the Supreme Court decided that the Stock Yard Co. was a common carrier engaged in interstate commerce, and subject to the provisions of the act. *United States, etc.* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286.

The Stock Yard Co. thereupon duly published its tariff, fixing the charge of 50 cents for loading and 25 cents for unloading each car, and the line-haul railways, in their published tariffs, absorbed these charges in the stated amount of 50 cents for loading and 25 cets for unloading each car, the absorbing words of the tariffs being:

> "Carriers as Shown Will Pay the Union Stock Yards & Transit Co.'s Charges as Follows:
>
> In Cents Per Car—Loading Charges 50
> Unloading Charges 25"

The Stock Yard Co. filed with the I. C. C., effective May 21, 1917, a tariff increasing these loading and unloading charges by 25 cents per car, which increase the line-haul carriers declined to absorb. The railroads did not amend their tariffs, but the charge of 25 cents increase per car was endorsed on the freight bills, and paid by the yards commission merchants—to whom the shipments were consigned—and ultimately received by the Stock Yard Co. When the railroads passed into Federal control (December 28, 1917) the Director General of Railroads likewise declined to absorb the 25 cents per car increase, and without publication of any further tariff the additional 25 cents per car continued to be collected and paid as before.

The Stock Yard Co., contending that by reason of certain

changes in its relation with the Chicago Junction Railway Co. it was no longer a common carrier of interstate commerce, filed with the I. C. C. its tariff, effective September 1, 1917, cancelling its previously filed loading and unloading tariff charge. The Commission suspended the effectiveness of the notice of cancellation from time to time until the expiration of Government control, so that it never became effective. The suspension of the cancellation left in force the last previously published tariff, which had increased the loading and unloading charge by 25 cents per car.

November 17, 1917, the Chicago Live Stock Exchange, composed of commission merchants at the Chicago stock yard, filed complaint with the I. C. C. against the Stock Yard Co. and the line-haul carriers, against the 25 cents loading and unloading increase, and charged that its collection violated sections 1 and 3 of the Interstate Commerce Act. This complaint was consolidated with the controversy respecting cancellation of the 25 cents per car increase, and the matters were heard by the Commission.

Respecting the complaint of the Chicago Live Stock Exchange, its demand for cessation of the increased unloading charge and for reparation involved the question of whose duty it was to load and unload the live stock at the Chicago yard. The proposition was discussed in the Commission's report and opinion (52 I. C. C. 209, February 11, 1919), and the conclusion was announced that: "3. The loading and unloading of live stock, in carloads, at the Chicago stockyards is a duty of the shipper."

March 31, 1919, the Exchange filed a petition for rehearing, and the Commission reopened the case, then, for the first time, naming the Director General of Railroads as a respondent. There was further hearing, and on July 15, 1920, the Commission filed an opinion, wherein it stated, *inter alia*:

> "For the reasons stated we are of opinion that our finding that it is the duty of the shipper to load and unload live stock in the stockyards at Chicago was error, and it is therefore reversed. And we now find that it was the duty of the carriers to unload and load live stock at that point."
>
> "We further find that shippers who paid and bore charges for unloading and loading live stock at the stockyards in addition to the rates to and from the stockyards and who are parties of record herein have been damaged in the amount of such charges and are entitled to repara-

tion, with interest from the date of such payment. The exact amount of reparation due each shipper can not be determined on this record, and they should comply with rule V of the Rules of Practice." *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry. Co. et al.*, 58 I. C. C. 164.

Thereupon the Exchange, on behalf of its members, whom it named, petitioned to have ascertained and awarded the amount of reparation to which each of such members is entitled. Under date of June 2, 1925, the Commission filed its report of the further hearing thereon, in which it found that the various named individuals, corporations, and firms constituting such members are entitled to reparation for the increased loading and unloading charges paid, and directed preparation of statements of the particular amounts, separated as to the participating carriers. 100 I. C. C. 266. Subsequent statements were filed with the Commission specifying the payments as to the various carriers, and the various members of the Exchange, and reparation was ordered accordingly.

During the course of the proceedings there was also filed a statement of the various shippers, and of the shipments to the different members, and of the carriers over whose lines the different shipments moved.

The reparation order directed the payments to be made to the several commission merchants, whom the Commission found to be entitled thereto, and the suit in the District Court upon the award was brought by these various commission merchants, corporations, firms, and individuals—103 of them.

Appellees contend that, while appellants physically paid the bills, they did not ultimately "bear" them, but that they were borne by the shippers of the live stock, and that therefore the several commission merchants had no such interest in the claims for reparation as entitled them to maintain suit thereon.

The general course of practice was this: The consignors shipped to the commission merchants. Upon arrival of the cars at the stock yards, the stock was unloaded by stock yard employes and placed in the pens of the different commission merchants, who generally sold the consignment the same day, receiving the purchase price before night. Upon arrival of the car the waybills, with the 25 cents unloading charge endorsed upon each, were delivered to the employes of the Stock Yard Co., who turned them over to a joint agent of the carriers and the Stock Yard Co. The agent checked the

weights and delivered the corrected bills to the Stock Yard Co., which then advanced to the line-haul carriers, for the consignees, the full amount of the bills, including the 25 cents additional unloading charge, and the carriers later paid the Stock Yard Co. its part of the charges.

The Commission merchants promptly accounted to their shippers for the amount realized from sale of their live stock, deducting commissions, freight charges, and other proper outlays of the commission merchants; and twice weekly the Stock Yard Co. collected from the commission merchants the amount of such advances to the carriers.

It would be seldom indeed that the commission merchants would advance their own money in payment of freight charges; but in case they did so they would be reimbursed promptly through realizing upon the shipment. To the extent that this may be an influential fact, it may be said that, in general, the commission merchants made no advances for the shippers, but paid the transportation charges out of the shippers' funds in their possession. But regardless of the precise order of the payments, it is clear that at the time of the proceedings for reparation the commission merchants had been long and fully reimbursed by the shippers for any such outlay, and it is not apparent how it can be said that the 25 cents charge was in fact "borne" by them, or by any one other than the shipper.

In the opinion of the District Court (*Adams et al.* v. *Mellon, Director General, et al.*, 39 F. (2d) 80) there was considered only the question whether appellants had such interest, or sustained such injury through payment of the increased charge, as entitled them to maintain this action. The opinion exhaustively and interestingly treats the question, and many cases are cited.

It appears that up to and including the time when the Commission made the decisions herein, reported at 52 I. C. C. 209 and 58 I. C. C. 164, it had held in a long line of cases that a consignee who did not actually bear alleged unlawful charges was not entitled to reparation therefor, notwithstanding he had in the first instance made payment to the carrier. That question was not discussed in either of those opinions; indeed, in that of 58 I. C. C. it was not undertaken to adjudge who in fact was entitled to the reparation, except to conclude that "shippers who paid and bore charges for unloading and loading live stock at the stockyards in addition to the rates to and from the stockyards and who are parties of record herein

have been damaged in the amount of such charges and are entitled to reparation, * * *." But in the decision made June 2, 1925, reported in 100 I. C. C. 266 (277) it was found that the various commission merchants therein named (who are the same as appellants here) "made the shipments" and "paid the charges thereon," and have been damaged and are severally entitled to reparation in their own names to the amount of the charges "as factors and agents for the shippers."

In the meantime (April 7, 1924) the Commission had decided the case of *Missouri Portland Cement Co.* v. *Director General*, 88 I. C. C. 492, wherein it reached a conclusion different from its theretofore long line of decisions, deciding that a consignee who had in the first instance paid an excessive transportation charge, though reimbursed, was a proper party to institute and maintain reparation proceedings. It appears that four of the Commissioners participating in the reparation award of 100 I. C. C. 268 did so "only as constrained thereto by the decision of the majority in *Missouri Portland Cement Co.* v. *Director General.*"

The action does not purport to be brought by appellants otherwise than in their respective individual capacities. Indeed, with attention directly challenged to their right to sue, it was contended by their counsel that they had such right, and while most likely the shippers would have the benefit of any recovery, this was wholly within appellants' volition.

In the District Court opinion Judge Woodward discusses the I. C. C. decisions, and many others, particularly *So. Pac. Co.* v. *Darnell-Taenzer*, 245 U. S. 531, and *L. & N. R. Co.* v. *Sloss-Sheffield*, 269 U. S. 217, reaching the conclusion that appellants in their own right may not maintain the suit.

Our examination of this question does not so entirely satisfy us of the correctness of the District Court's conclusion thereon as to justify our deciding the appeal upon ground so formal and technical, if a proper result may be reached upon the merits of the cause.

In considering appellants' motion made after judgment had been entered, for reopening the case and permiting amendment to be made to the declaration to the end that the plaintiffs may maintain the action as trustees for the various shippers, evidently the ground upon which the court had directed the verdict was again questioned. The court then said: "While the court, in its opinion, did not advert to the other points argued by the defendants, yet it seems to the court that on

other grounds, not referred to in the opinion, the judgment of the court may be maintained." In our view of the case there are other grounds on which the judgment may be rested.

It would greatly transcend the reasonable scope of such an opinion to present discussion of all of the many propositions put forward by the parties in the 700 printed pages of briefs and arguments submitted to us. Our further comments will relate to the merits of the reparation claims, without regard to the right of appellants to maintain the action therefor.

For the contention that the Stock Yard Co. could not lawfully impose on the shipper these increased charges, appellants place much reliance on *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128. A decree was there affirmed finding that certain terminal charges at the Covington stock yards were for services which the carrier was bound to perform, and that a consignee would not be obliged to make use of those yards for unloading live stock unless such additional charge was waived; and in default of such waiver of charges the consignee might himself maintain suitable located pens at which stock consigned to him should be delivered by the carrier if he, the consignee, would keep a representative there to receive the stock. That action was begun in 1886—before the passage of the Interstate Commerce law—and of course was uninfluenced by published tariffs of a participant in interstate commerce, as is the case with the Chicago yard. The situation was entirely different, and in our judgment the case has little if any application here.

Since the passage of the Interstate Commerce law the right to make separate terminal charges seems clear, but with the limitation that such charges, if themselves reasonable, must not, in connection with all the other transportation rates, produce an unreasonable aggregate. *I. C. C.* v. *C. B. & Q. R. R. Co.*, 186 U. S. 320; *I. C. C.* v. *Stickney, et al.*, 215 U. S. 98.

United States v. *Union Stock Yard Co., supra*, also relied on to same effect, far from sustaining appellants' contention of the impropriety of the additional charge, in our judgment does the very contrary by holding the yards company to be an interstate carrier, under the jurisdiction of the Commission, and required to file tariff rates for that part of the service which it performs, and to collect and receive its rates while its published tariff remains in effect.

The absorption by the line-haul carriers of the originally filed rate of 50 cents and 25 cents for loading and unloading cars was not a gratuity on the part of the carriers. The com-

prehensive operations of the Stock Yard Co. greatly facilitated the handling of stock at Chicago for all the line-haul carriers. It undertook the service of rapidly unloading the cars coming into that great market. Its facilities made possible that elasticity of service which tended continuously to speed the unloading of live stock, regardless of variations in daily deliveries by the several carriers, and promptly to release the rolling stock for further movement.

Under the law the entire transportation service must be rendered at a reasonable rate, and the absorption of this loading and unloading charge was in fact a promulgation by the line-haul carriers of such a rate for the entire service as was then deemed reasonable. The result to the shipper would hve been the same had the line-haul carriers correspondingly reduced their rates, and not absorbed the loading and unloading charges.

In our judgment this absorption extended only to the amounts specifically named in the absorption clause; and, when the Stock Yard Co. promulgated its 25 cents increase, not only did the original absorption not include this increase, but the line-haul carriers definitely refused to absorb it; and when the carriers passed into Federal control the refusal to absorb was persisted in. But this left it none the less the lawful duty of the Stock Yard Co. to collect the increased charge of 25 cents upon each car, and failure to collect would have subjected that company to the penalties which the law prescribes.

The ineffectual attempt to cancel its published tariff left it in continuing force until, upon the close of Federal administration, section 418 of the Transportation Act definitely, and for the first time, required thereafter the line-haul carriers to load and unload all live stock offered for shipment.

If, when the cars reached the yard, and either before or after unloading, the Stock Yard Co. had demanded, and the consignees had paid, the 25 cents charge, we do not think it could be said that the line-haul carrier made the collection. But it seems to us that, notwithstanding the seeming circuity, it was the Stock Yard Co. which in effect collected the charge from the shipper or consignee. Upon arrival of the cars the Stock Yard Co., for and on behalf of the consignees, advanced the entire transportation charges, including the 25 cents, and turned the entire amount over to the line-haul carriers, which turned back to the Stock Yard Co. the 25 cents, together with the other yard charges. Whatever the form of the transac-

tion, it seems to us to have been, in essence, but a collecting of the 25 cents by the Stock Yard Co., which, under its published tariff, it was bound in any event to collect. No one was taken by surprise or deceived. The rate had been duly published and shippers or their representatives, the commission merchants, knew of this charge, and that the Stock Yard Co. would be obliged in some manner to collect it.

No contention is made that the charge itself was unreasonable, or that, taken in connection with the other transportation charges, the entire rate was unreasonable. The extent of the Commission's second conclusion was that the collection of the increased 25 cents was "an unlawful and unreasonable *practice.*" The finding that it was an unreasonable *practice* is not a finding that it was an unreasonable rate.

We judicially know, even if the record did not disclose it, that the cost of such service as was rendered at the stock yard had increased very materially by the beginning of Government control of the railroads, and this was the only increase in that rate since it was first fixed, many years before the World War began, notwithstanding the very substantial increase in transportation rates generally.

It seems from the record that in these tariffs themselves there is a background of authoritative rules and regulations which tend strongly to fortify the conclusion reached in the Commission's first decision, and our views as well.

It is stipulated by the parties that "all shipments of livestock involved in this suit consisted of carloads moved on carload ratings as ordinary livestock." It appears in Official Classification No. 44, under head of "Rules and Special Instructions":

> "Unless otherwise provided when property is transported subject to the provisions of the Official Classification, the acceptance and use are required, respectively, of the 'Uniform Bill of Lading,' 'Straight' or 'Order,' 'Export Bill of Lading,' 'Uniform Live Stock Contract' * *"

In the Uniform Live Stock Contract it is provided that:

> "Sec. 5. The shipper at his own risk and expense shall load and unload said live stock, * * *"

and that:

> "8. It should be understood in receiving Live Stock of any description for transportation, that the actual delivery does not commence until the stock has been placed in the car, and the responsibility of the Railroad Company shall cease upon the delivery of the car at the sta-

tion to which it is consigned. The consignor and the consignee are responsible for the loading and unloading of the same, the carrier assuming no liability whatever in regard to such loading and unloading."

These provisions were in force throughout the period of Federal control of railroads. Their existence is not disputed —only their application is denied by appellants.

There is significance in the fact that the Government, in taking over the transportation facilities, did not take over the stock yard. It is quite likely that this branch of the transportation was deemed in its nature quite separable from the rest, and that this highly specialized service had best continue to be carried on wholly by this agency of proved efficiency, an agency which was no doubt considered best suited to cope with the then unprecedented conditions which brought to the stock yard live stock in stupendous quantities, to feed a world at war. In those crucial months the basic live stock and packing industry could not well be hampered by tie-ups and confusions at the point of convergence in the great Chicago market of the many railroads bringing in live stock by the thousands of cars daily. The extraordinary conditions required extraordinary facilities to meet them. A unified and continuous unloading of these tremendous stock receipts, and their intelligent handling and disposal, manifestly conferred upon shippers as well as line-haul carriers, an advantageous service mor effective and satisfactory than if undertaken by each of the several line-haul carriers for the live stock which it carried.

That the transportation of live stock does not impose on the carrier all the responsibilities attendant upon the carriage of goods, is logical, and has been distinctly recognized. *No. Penn. R. R. Co.* v. *Bank,* 123 U. S. 727; *Covington Stock-Yards Co.* v. *Keith, supra.* The reasonable necessities of transportation at a given place or time may be entirely different from those of another place or time.

Harking back to the conditions under which this service was rendered, we cannot but conclude that the special benefit of the stock yard unloading service which then accrued to the shipper or consignee, at largely added cost to the Stock Yard Co., was properly the subject of an increased unloading charge outside of and beyond that which was otherwise included in the line-haul carriers' published transportation rates, very much as in "Dunnage Allowances, 30 I. C. C. 538"

referred to in the opinion herein of the Commission in 52 I. C. C.

Appellants earnestly urge that the collection of this charge was a tort, and that all participants therein were joint tort feasors. We cannot believe that the Stock Yard Co. committed a tortious act in collecting and receiving its tariff charge, the failure to collect and receive which would have been a breach of its statutory duty. Nor do we understand how the Director General of Railroads became a tort feasor through his continuing the prior practice of receiving from the Stock Yard Co. the entire rate, including the additional loading and unloading charges, and then turning back to the Stock Yard Co. that part of the total charge to which it was entitled. Particularly is this so when there is no pretense that either the charge itself or the entire rate including this charge was excessive. But even if technically to be considered a tort, under all the circumstances so far as the record discloses it was at most *damnum absque injuria.*

The judgment awarded costs against appellants. Concededly this contravenes the statute (§ 16 (2), Tit. 49, U. S. C.), which provides "that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal."

The judgment should be modified by eliminating therefrom the award of costs in the District Court. The District Court is directed to make such modification, and, as so modified, the judgment is affirmed, with costs of this appeal against appellants.

And on the same day, to-wit: On the 27th day of July, 1931, the following further proceedings were had and entered of record, to-wit:

Monday, July 27, 1931.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

George J. Adams and A. W. Kitchen, Copartners trading as Adams & Kitchen; John G. Adler and Alfred E. Adler, copartners trading as Adler Sons & Company; Alexander, Conover & Martin, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; John A. Babcock, an individual trading as John A. Babcock & Company; Fred L. Heyne and E. H. Baker, copartners trading as Baker, Heyne & Company; W. A. Peterson, trading as Bacon, Peterson & Company; Bowles Live Stock Commission Company, a corporation organized and existing under the laws of the State of West Virginia with its principal place of business at Chicago in the State of Illinois; E. C. Brown and Seth B. St. John, copartners trading as Brown-St. John Company; Thos. H. Brown; George M. Brownson and J. L. Ettlinger, copartners trading as Brownson & Ettlinger; Byers Brothers Company, a corporation organized and existing under the laws of the State of Missouri with its principal place of business at Chicago in the State of Illinois; Wm. B. Swiney, Chas. M. Swiney and Thos. E. Swiney, copartners trading as Swiney Bros., successors to Bunker & Swiney; J. B. Cahill, trading as J. B. Cahill & Company; Central Live Stock Commission Company, a corporation organized and existing under the

laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Ernest Clark and Louis Armbrecht, copartners trading as Clark, Armbrecht & Company; E. A. Clark, trading as Clark, Bowles & Company; John Clay, John G. Forrest, C. A. Kleman, F. H. Connor and C. L. Robinson, copartners trading as Clay, Robinson & Company; James R. Clegg, an individual trading as James R. Clegg & Company; A. M. Henneberry and N. W. Cochran, copartners trading as Cockran & Henneberry; W. P. Collings, trading as W. P. Collings & Son; Conklin Bros. Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; H. D. Copeland & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; J. M. Corrick; J. F. Cross and H. G. Sommers, copartners trading as Cross, Sommers & Company; A. B. Daniels; P. T. Dolan and Fred Ludeman, copartners trading as Dolan & Ludeman; J. M. Doud & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; S. S. Driver, an individual trading as S. S. Driver & Company; Chas. R. Beason and P. E. Moroe, copartners trading as Drovers Commission Company; J. W. Eastland, and individual trading as J. W. Eastland & Company; Guy Wheeler and T. K. Polley, copartners trading as Emmett, Wheeler & Polley; E. H. Kuenster, surviving partner of copartnership of Erwin & Kuenster; Evans, Snider, Buel Company, a corporation organized and existing under the laws of the Etate of Illinois with its principal place of business at Chicago in the State of Illinois; Filler Wilson & McClelland, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; O. D. Freeland and C. M. Godfrey, copartners trading as Freeland & Godfred; Fred Freeman, an individual trading as Fred Freeman & Company; P. J. Fitzgerald and G. S. Freeman, copartners trading as Freeman, Fitzgerald & Company; Wm. Gentleman, A. M. Gentleman, C. F. Gentleman and G. J. Gentleman, copartners trading as Wm. Gentleman & Sons; S. G. Gillogly, R. E. Gillogly, F. D. Gillogly and F. T. Gillogly, copartners trading as Gillogly & Company; Chas. E. Harding, trading as Chas. E. Harding &

Company; Hefner Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Geo. F. Hogan, trading as Geo. F. Hogan & Company; A. Warheimer, E. H. Ingwerson, J. H. Ingwerson, Dan R. Ingwerson, D. C. Mosier and A. C. Barroff, copartners trading as Ingwerson Bros.; Iowa Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; I. W. Knettle and Edwin Knettle, copartners trading as Knettle Bros.; Knollin Sheep Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; E. H. Kuenster, an individual trading as Kuenster Livestock Commission Company; A. J. Laberthe; L. S. Larrison, an individual trading as L. S. Larrison and Company; Lee Live Stock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; F. C. Ludeman, an individual trading as F. C. Ludeman & Company; McCausland, Hoag & Vaugh, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Wm. Mahoney; J. P. Maley and Harry L. Carpenter, copartners trading as Maley Carpenter & Company; John P. Martin, James G. Martin, George E. Martin and Wm. S. Burmister, copartners trading as Martin Bros. & Company; Miller White & Woods, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; P. T. Dolan, trading as Miller & Dolan; Frank R. Mullen, trading as Mullen Commission Company; Robert S. Murray, trading as Murray & McDowell; B. F. Hubbird, trading as Minteer Hubbird & Company; National Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Northwestern Livestock Commission, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois, G. W. Nixon, C. S. Horn and W. H. Chisholm, copartners trading as Nixon, Horn &

Chisholm; North American Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; Silas Palmer and W. H. Palmer, copartners trading as Silas Palmer & Son; T. B. Vincent and C. H. Boothroyd, copartners trading as Paris Commission Company; W. C. Patterson, trading as John Patterson & Son; W. A. Peterson and Wm. Turnbull, copartners trading as Peterson, Turnbull & Company; J. H. Piatt, trading as Abner Piatt & Company; Thos. K. Polley, trading as Thos. K. Polley & Company; R. H. Pritchard, trading as Pritchard Commission Company; Chas. R. Rice and Oscar A. Rice, copartners trading as Rice Bros; J. B. Roach and W. P. Roach, copartners trading as Roach Livestock Commission Company; Rosenbaum Brothers & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; F. W. Sheldon trading as F. W. Sheldon & Company; W. Harry Sherwood and Russell H. Sherwood, copartners trading as Sherwood & Son; J. Paul Shinn, Chas. H. Moberly and I. O. Fry, copartners trading as Shinn, Fry & Moberly, successors to Shinn, Fry & Company; James G. Shutter; W. R. Smith, J. C. Eastes and John Smith, copartners trading as W. R. Smith & Son; T. B. Stafford and A. B. Stafford, copartners trading as Stafford Bros.; Standard Livestock Commission Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; A. F. Starrett, Jr., O. A. Mathison, A. C. Granger and M. E. Peschong, copartners trading as Starrett, Mathison & Company; Chas. H. Stephens and J. A. Goble, copartners trading as Stephens & Goble; A. F. Stewart, trading as A. F. Stewart & Company; J. E. Strader and J. L. Strader, copartners trading as Strader Bros.; J. J. Sullivan and J. C. Sullivan, copartners trading as Sullivan Commission Company; A. Gilmore, C. L. Swanson and C. J. Castenholz, copartners trading as Swanson, Gilmore and Castenholz; Harry Thompson and C. N. Ball, copartners trading as Thompson & Ball; Thos. Tipton, E. M. Steck and W. P. Herrick, copartners trading as Tipton, Steck & Herrick; D. L. Trout and F. L. Trout, copartners trading as Trout Livestock Commission Company; G. B. Van Norman, an individual

trading as G. B. Van Norman & Company; Van Norman Lawler & Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago in the State of Illinois; W. H. Walter, trading as Walter Bros.; A. A. Walters, C. A. Dunbar and J. H. Dunbar, copartners trading as Walter & Dunzar; L. B. Werden; W. W. Wilson and Chas. A. Wilson, copartners trading as W. W. Wilson & Company; Jet Wimp, trading as Jet Wimp & Company; Kay Wood and Chas. A. Wood, copartners trading as Wood Bros.; Curtis A. Wood and Walter R. Wood, copartners trading as Curtis A. Wood and Company; L. B. Yancey; and W. E. Young, trading as W. E. Young & Company

4462 *vs.*

To The Union Stock Yard & Transit Company, a Corporation, and Andrew W. Mellon, Director General of Railroads, as agent for the following corporations: The Atchison, Topeka & Santa Fe Railway Company; The Baltimore & Ohio Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; The Chesapeake and Ohio Railway Company of Indiana; The Chicago and Alton Railroad Company; Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Great Western Railroad Company; Chicago, Indianapolis & Louisville Railway Company; Chicago Junction Railway Company; Chicago, Milwaukee and St. Paul Railway Company, and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers; The Chicago Rock Island and Pacific Railway Company; Chicago, Terre Haute & Southeastern Railway Company; The Cleveland, Cincinnati, Chicago, and St. Louis Railway Company; Grand Trunk Western Railway Company; Illinois Central Railroad Company; Indiana Harbor Belt Railroad Company; The Michigan Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; New York Central Railroad Company, New York, Chicago & St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; The Toledo, St. Louis & Western Railroad

Company, and J. Frank Johnson and Harry A. Dunn, Receivers, and Wabash Railway Company

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Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from The District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be modified by eliminating therefrom the award of costs in the District Court. The said District Court is hereby directed to make such modification, and as so modified the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs in this appeal against the appellants.

And afterwards, to wit: On the fifteenth day of August, 1931, there was filed in the office of the clerk of this Court, a petition for a rehearing, which said petition for a rehearing is not copied here.

And on the same day, to wit: On the fifteenth day of August, 1931, there was filed in the office of the clerk of this Court a Proof of Service of petition for a rehearing, which said Proof of Service is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1930. April Session, 1931.

No. 4462.

George J. Adams & A. W. Kitchen, Co-partners trading as Adams & Kitchen, *et al.*, *Appellants*,
vs.
Andrew W. Mellon, Director General of Railroads, etc., *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
Hon. Charles E. Woodward, Judge Presiding.

RECEIPT OF COPIES OF PETITION FOR A REHEARING.

Receipt is hereby acknowledged from the attorneys for the petitioners in the above entitled of three (3) copies of the petition for rehearing filed by appellants in the above entitled cause on the 15th day of August, A. D. 1931.

Dated, this 15th day of August, A. D. 1931.

SILAS H. STRAWN,
RALPH M. SHAW,
FRANK H. TOWNER,
Counsel for Union Stock Yard & Transit Company, one of the appellees in the above entitled cause.

Endorsed: Filed Aug. 15, 1931. Frederick G. Campbell, Clerk.

And on the same day, to wit: On the fifteenth day of August, 1931, there was filed in the office of the Clerk of this Court an Affidavit of Mailing, which said Affidavit of Mailing is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1930. April Session, 1931.

No. 4462.

George J. Adams and A. W. Kitchen, Co-partners trading as Adams & Kitchen, *et al.*, *Appellants*,
vs.
Andrew W. Mellon, Director General of Railroads, etc., *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
Hon. Charles E. Woodward, Judge Presiding.

AFFIDAVIT OF MAILING COPIES OF PETITION FOR REHEARING TO COUNSEL FOR APPELLEES.

State of Illinois, } ss.
County of Cook, }

FRANKLIN J. STRANSKY, being first duly sworn, on oath deposes and says that he is one of the attorneys for the petitioners in the above entitled cause; that on Saturday, the 15th day of August, A. D. 1931, he personally sent by regular United States Mail, with the proper amount of postage thereto affixed, properly addressed, to A. A. McLaughlin, of counsel for Andrew W. Mellon, Director General of Railroads, one of the appellees in the above entitled cause, at 1115 Bankers Trust Building, Des Moines, Iowa, the same being the business address of the said A. A. McLaughlin, two (2) copies of the petition for rehearing filed by appellants in the above entitled cause on the 15th day of August, A. D. 1931, and that on the same date he did personally send by regular United States Mail, with the proper amount of postage thereto affixed, properly addressed, to Sidney F. Andrews, of counsel for Andrew W. Mellon, Director General of Railroads, one of the appellees in the above entitled cause, at Hurley-Wright Building, Washington, D. C., the same being the business address of the said Sidney F. Andrews, two (2) copies of the

said petition for rehearing filed by appellants in the above entitled cause as aforesaid.

FRANKLIN J. STRANSKY.

Subscribed and sworn to before me, the undersigned Notary Public in and for the County of Cook and State of Illinois, this 15th day of August, A. D. 1931.

D. J. WARD
Notary Public.

Endorsed: Filed Aug. 15, 1931. Frederick G. Campbell, Clerk.

And afterwards, to wit: On the twenty-fourth day of August, 1931, there was filed in the office of the clerk of this Court an Answer to Petition for a Rehearing, which said Answer to Petition for a Rehearing is not copied here.

And afterwards, to wit: On the twenty-seventh day of August, 1931, there was filed in the office of the clerk of this Court a Reply to Answer to petition for Rehearing, which said Reply to Answer to Petition for Rehearing is not copied here.

And afterwards, to wit: On the twenty-second day of September, 1931, the following further proceedings were had and entered of record, to wit:

Tuesday, September 22, 1931.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

George J. Adams and A. W. Kitchen, *et al.*
4462 *vs.*
Andrew W. Mellon, Director General of Railroads, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby denied.

It is further ordered by the Court that the mandate of this Court in this cause be, and the same is hereby stayed until the further order of Court.

It is further ordered that counsel for appellants file in this Court proof of the filing of the petition for writ of certiorari in the Supreme Court of the United States upon the filing of said petition in said Court.

And afterwards, to wit: On the fourth day of November, 1931, the following further proceedings were had and entered of record, to wit:

Wednesday, November 4, 1931.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding
Hon. Evan A. Evans, Circuit Judge
Hon. William M. Sparks, Circuit Judge
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal

George J. Adams & A. W. Kitchen, Co-partners trading as Adams & Kitchen, *et al.*,
4462 *vs.*
Andrew W. Mellon, Director General of Railroads, etc., *et al.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of the appellants herein by their counsel, it is ordered that the original exhibits in this cause now on file with the Clerk of this Court be withdrawn and transmitted by the Clerk under his proper certificate and the seal of this Court to the Clerk of the Supreme Court of the United States for the use of the Supreme Court in considering the appellants' petition for a writ of certiorari.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 381 to 410, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel and stipulations and orders relating to filing of briefs, the petition for a rehearing, answer to petition for a rehearing, and the reply to answer to petition for a rehearing) in the case of

George J. Adams and A. W. Kitchen, Co-partners trading as Adams & Kitchen, *et al.*,

Appellants,

vs.

Andrew W. Mellon, Director General of Railroads, as Agent The Union Stock Yard & Transit Company, *et al.*,

Appellees,

No. 4462, October Term, 1930, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 16th day of November, A. D. 1931.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 25, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1646)

FILE COPY

FILED
DEC 21 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,
Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FRANKLIN J. STRANSKY,
CLAIR R. HILLYER,
JAMES P. CAREY, JR.,
Counsel for Petitioners,
230 South Clark St.,
Chicago, Ill.

BUTTERWORTH-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

PAGE NO.

I. Summary Statement of the Matter Involved..... 3
Petitioners paid the unlawful charge..... 11
II. Reasons relied upon for allowance of Writ..... 13
III. Prayer of Petition..... 19

TABLE OF CASES CITED.

Adams & Kitchen, et al. v. Andrew W. Mellon, Director General of Railroads et al., (U. S. D. C.) 39 Fed. (2nd) 80.... 2

Adams & Kitchen et al. v. Andrew W. Mellon, Director General of Railroads, et al. (C. C. A. 7), 51 Fed. (2nd) 620.... 2

Arcadia Mills v. Carolina, C. & O. Ry., 293 Fed. 639..... 19

Atchison, T. & S. F. Ry. Co. v. United States, 232 U. S. 199... 18

Board of Trade v. C. & A. R. R. Co., 3 I. C. C. 235.....5-10

Cattle Raisers' Ass'n v. Chicago, B. & Q. R. Co., 10 I. C. C. 83..... 3

Cattle Raisers' Ass'n v. Chicago, B. & Q. R. Co., 11 I. C. C. 277..... 3

Cattle Raisers' Ass'n v. Chicago, B. & Q. R. Co., 12 I. C. C. 507..... 3-4

Cattle Raisers' Ass'n v. Fort Worth & Denver City R. Co., 7 I. C. C. 513..... 3-5

Cattle Raisers' Ass'n v. Fort Worth & Denver City R. Co., 7 I. C. C. 555a..... 10

Cattle Raisers' Ass'n v. Missouri, K. & T. R. Co., 11 I. C. C. 296..... 3

Chicago Live Stock Exchange v. C. G. W. Ry. Co., 10 I. C. C. 428..... 5-10

Consolidated Cut Stone Co. v. Atchison, T. & S. F. Ry. Co., 39 Fed. (2d) 661..... 19

Covington Stock Yards Co. v. Keith, 139 U. S. 128..... 16

Detroit Coal Exchange v. Director General, 80 I. C. C. 258.. 19

Great Northern Ry. v. Merchants Elevator Co., 259 U. S. 285 15

Hercules Powder Co. v. New York Central R. R. Co. and Director General, 78 I. C. C. 55 19

Illinois Central R. R. Co. v. Interstate Commerce Commission, 206 U. S. 441 ..... 15, 16

Interstate Commerce Commission v. Chicago, B. & Q. R. Co., 186 U. S. 320 3-4-5

Interstate Commerce Commission v. Delaware, L. & W. R. R. Co., 220 U. S. 235 18

Interstate Commerce Commission v. Stickney, 215 U. S. 98 .. 3-5

Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541 16

Legal Oil & Gas Co. v. Chicago & North Western Ry. Co., 179 I. C. C. 57 ..... 18, 19

Lewis v. Southern Pacific Co., 283 U. S. 654 17-18

Los Angeles Switching Case, 234 U. S. 294 18

Louisville & N. R. Co. v. Sloss-Sheffield Co., 269 U. S. 217 .... 17, 18

Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412 19

Memphis Freight Bureau v. St. Louis-San Francisco Ry. Co. and Director General, 57 I. C. C. 212 19

Merchants & Manufacturers Traffic Ass'n v. United States, 231 Fed. 292 19

Missouri Portland Cement Co. v. Director General, 88 I. C. C. 492 ..... 18, 19

Northern Pacific Co. v. Solum, 247 U. S. 477 18

Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531 ..... 17, 18

Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117 19

Standard Oil Co. v. United States, 283 U. S. 235 15

Texas Live Stock Shippers Protective League v. Director General, 139 I. C. C. 448 19

United States v. Union Stock Yards, 226 U. S. 286 16

Western Electric Co. v. Director General, 87 I. C. C. 545 19

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. .....

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,

Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, George J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen, and all other persons and corporations named as plaintiffs in the above entitled cause in the District Court of the United States for the Northern District of Illinois, Eastern Division, respectfully represent unto your Honors:—that on December 12, 1927, your petitioners, by an order of the Interstate Commerce Commission (R. 157 to 208), were severally held to be entitled to reparation from the respondents, Director General of Railroads and Union Stock Yard & Transit Company, aggregating $140,001.25, plus legal

interest and reasonable attorney's fees, as provided by statute (R. 157 to 208); that said last mentioned order was based on prior reports and findings of the Commission in said cause entered on June 2, 1925, (100 I. C. C. 266; R. 147 to 157), July 15, 1920, (58 I. C. C. 164; R. 141 to 146), and February 11, 1919, (52 I. C. C. 209; R. 121 to 140), respectively; that on the 10th day of December, A. D. 1928, your petitioners filed, in the District Court of the United States for the Northern District of Illinois, Eastern Division, (R. 4) their petition to recover damages on account of moneys exacted from them by respondents in accordance with the several amounts to which your petitioners were held to be entitled by the said order of the Interstate Commerce Commission entered, as aforesaid, on December 12, 1927; that on January 28, 1930, (R. 78) at a trial of said cause before a jury, the Honorable Charles E. Woodward, Judge of said District Court, directed the jury to find their verdict in favor of said respondents and against these petitioners, and thereupon entered judgment *nil capiat* against your petitioners and for costs; that thereupon an appeal was duly taken by your petitioners from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit, which court, on July 27, 1931, (R. 389 to 399), affirmed said judgment of the District Court, except as to the portion of the said judgment of the said District Court awarding costs against your petitioners; that thereupon, within the time provided by the rules of said United States Circuit Court of Appeals, a petition for rehearing was filed by your petitioners (R. 405), which petition for rehearing was, on the 22nd day of September, 1931, denied, (R. 409).

The opinion of the District Court is reported in 39 Fed. (2nd) 80. (R. 60 to 77)

The opinion of the Circuit Court of Appeals is reported in 51 Fed. (2nd) 620. (R. 389-399)

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The present case is one arising under the Federal Transportation Act. The questions involved turn upon the administration, construction and interpretation of said Act.

The particular question involved is one of real substance growing out of a practice employed by respondents to exact from petitioners a charge of 25 cents per car for unloading live stock at the Union Stock Yards, in Chicago, in addition to the rates and charges set forth in the then existing published tariffs of the line-haul carriers operating under Federal Control.

The case is another chapter involving a controversy of long duration as to terminal charges of the railroads delivering live stock at the Union Stock Yards in Chicago. A history of its antecedents to the present litigation is found in *Cattle Raisers' Association* v. *Fort Worth & D. C. R. Co.*, 7 I. C. C. 513; *Cattle Raisers' Asso.* v. *C. B. & Q. R. Co.*, 10 I. C. C. 83; *Cattle Raisers' Asso.* v. *Chicago, B. & Q. R. Co.*, 11 I. C. C. 277; *Cattle Raisers' Asso.* v. *Missouri, K. & T. R. Co.*, 11 I. C. C. 296; *Cattle Raisers' Asso.* v. *C. B. & Q. R. R. Co.*, 12 I. C. C. 507; *Inter. Com. Commission* v. *Chicago, etc., Rd. Co.*, 186 U. S. 320; *Interstate Commerce Comn.* v. *Stickney*, 215 U. S. 98.

The proceedings before the Commission in the instant case involved many lengthy and protracted hearings during which the testimony of nearly a hundred witnesses was introduced. (See Original Exhibits Nos. 5-6-7-8-9-10-11-12 certified to this court as original exhibits.)

The exhibits introduced in evidence before the Commission are extraordinarily voluminous and sufficient in bulk to make a small sized truck load. (See large box and

separate package of original exhibits certified to this court by the Clerk of the United States Circuit Court of Appeals). For the convenience of this court we have compiled and caused to be printed in a volume separate from the printed record, excerpts from said original exhibits containing matters germane to the points here under discussion, which printed volume is herein referred to as "Printed Excerpts from Original Exhibits."

Respondent Union Stock Yard & Transit Company was organized in 1865 by the railways delivering live stock to the Chicago market. It constructed the Union Stock Yards, consisting of chutes, pens, and the various appliances necessary for the unloading and marketing of live stock. It also built railroad tracks necessary to connect the various lines of railways which then reached Chicago with the Union Stock Yards, and entered into an arrangement with these railways by which they were to operate their own trains over the tracks of the Stock Yard Company to the stock yards without the payment of any other compensation than an unloading charge of 25 cents per car paid by the line-haul carriers to the Stock Yard Company. (*Cattle Raisers' Association of Texas* v. *Chicago, Burlington & Quincy Railway Co.*, 12 I. C. C. 508.)

In 1894 the Stock Yard Company announced its intention of imposing a charge for the use of the tracks leading to the stock yards of from 80 cents to $1.50 per car. The railways in turn, by tariffs duly filed and posted and effective June 1, 1894, imposed upon the shipper a charge of $2.00 per car for delivering carloads of live stock at the Union Stock Yards. (*Cattle Raisers' Association of Texas* v. *Chicago, Burlington & Quincy Railway Co.*, 12 I. C. C. 508.) The validity of said $2.00 terminal charge was before this court in *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy Railway Co.*, 186 U. S. 320,

where this court in its opinion sets forth the history of the organization of respondent Union Stock Yard & Transit Company, its objects and purposes, its relation to the railroads utilizing its facilities, the charges from time to time imposed by the Stock Yard Company on said railways, and the facts surrounding the filing by said railways in their published tariffs of a terminal charge of $2.00 per car, covering trackage, switching of cars, and the delivery of the live stock in the Union Stock Yards. An extract from the report of the Commission, shown in a note on pages 329 to 333 of the opinion in *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy Ry. Co.*, 186 U. S. 320, specifically shows that such terminal charge of $2.00 included the unloading of live stock at the Yards. The opinion in that case (p. 327) also calls attention specifically to the fact that said $2.00 terminal charge *includes* the trackage charge and *the cost of unloading.*

The same $2.00 terminal charge was again before this court in the case of *Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98, in which case, in the opinion, it also appears (p. 108) *that the charge for unloading live stock at the Yards was included in the $2.00 terminal charge.*

A portion of the so-called unloading charge was also included in the line-haul rates of the line-haul carriers and the expense of such unloading service set up in justification for such line-haul rates. (See Original Ex. 7, p. 1053; *Board of Trade* v. *C. & A. R. R. Co.*, 3 I. C. C. 235, Original Ex. 7, p. 1044; *Chicago Live Stock Exchange* v. *C. G. W. Ry. Co.*, 10 I. C. C. 428, Original Ex. 7, p. 1055; *Cattle Raisers' Assn.* v. *Fort Worth & Denver City R. Co.*, 7 I. C. C. 513, Original Ex. 7, p. 1040.)

The services rendered by the Stock Yard Company to the line-haul carriers in connection with shipments of live stock to and from the stock yards were found by the Commission to be as follows:

(a) Guaranteeing the railroad companies against loss arising out of the delivery of live stock without the surrendering of the bill of lading; (b) guaranteeing freight charges; (c) loading and unloading the freight; (d) notifying the consignees; (e) correctly tabulating the car numbers and contents of the car; (f) furnishing the weights to the carriers; (g) maintaining records as to dead and crippled animals and maintaining records showing deliveries to "billed consignees"; (h) furnishing the railroad companies terminal facilities for the receipt and delivery of live stock at Chicago. (R. 127)

For all these services combined, the Stock Yard Company was paid by the line-haul carriers the full amount of the charges set forth in the published tariffs of the Stock Yard Company under the designation "loading and unloading of live stock" (R. 128; Original Ex. 6, pp. 316 to 324, 330, 473, 474—Printed Excerpts from Original Exhibits, pp. 21 to 40; Original Ex. 7, pp. 975 to 979—Printed Excerpts from Original Exhibits, pp. 61 to 65.)

The line-haul carriers in their published tariffs specifically named a commodity or line-haul charge of a certain amount per hundred pounds to the Union Stock Yards, in Chicago, which commodity or line-haul charge, plus a $2.00 per car terminal charge, constituted the through charge and included delivery of live stock to the consignee at the stock yards. See Commission's Finding of this fact (R. 144). (L. A. Lowrey Agent's Tariff No. 20-J, I. C. C. No. 37—Original Ex. 1.)

In the published tariffs of the line-haul carriers there was contained a specific line-haul or commodity rate to the Union Stock Yards, Chicago, known as the "flat Chicago rate" (Printed Excerpts from Original Exhibits, p. 172). Immediately after the Stock Yard Company was compelled to publish its tariff schedules, the line-haul car-

riers caused to be inserted in their tariff schedules a so-called absorption clause, in which it was in effect stated that said carriers, without further charge to the shipper than the charges contained in the line-haul rates and in the $2.00 terminal charge, would pay the unloading charges of the Union Stock Yard & Transit Company, specifically mentioning the then amount of such charges. After the Stock Yard Company, on May 21, 1917, had filed new tariff schedules increasing both its loading and unloading charges by 25 cents per car, the line-haul carriers made no change whatever, either in their line-haul rates, the $2.00 terminal charge, *or the language of the so-called absorption clause.*

Shortly prior to and during the period of the World War, on account of the increased cost of labor and expenses of transportation in general, the line-haul carriers were first granted a flat increase of 5 per cent on live stock shipments, and afterwards the tariffs thus increased by 5 per cent were again increased by a flat raise of 15 per cent (Original Ex. 7, pp. 890-891—Printed Excerpts from Original Exhibits, pp. 59-60). On May 25, 1918, by virtue of General Order No. 28, issued by W. G. McAdoo, Director General of Railroads, the transportation charges of the line-haul carriers for freight, including live stock, as theretofore increased, were increased by another flat raise of 25 per cent. On June 21, 1917, new tariff schedules of the Stock Yard Company increasing the so-called unloading charge by 25 cents per car were published. The Stock Yard Company in its published tariffs and in its subsequent actions made it clear that such published tariffs were intended not to affect the shipper, but were to affect only the charge to be made by it to the line-haul carriers, said tariffs reciting, "the charge made by this company for the service (as a carrier's agent) of loading and unloading live stock at the Union Stock Yards at Chicago, Illi-

nois," (R. 250-251; Original Ex. 6, pp. 316-341; Printed Excerpts from Original Exhibits, pp. 21 to 36).

The line-haul carriers, after the increase of 25 cents per car by the respondent Stock Yard Company, made no corresponding change, or any other change, in their published tariffs on file with the Commission (R. 145, 390).

Shortly after the publication of such increased charges by the Stock Yard Company a controversy arose between it and the line-haul carriers concerning the manner of collecting this extra 25 cents per car, and who should pay it, the Stock Yard Company insisting that the line-haul carriers and not the shippers should be made to bear the burden of such increase (Original Ex. 6, pp. 10 to 38—Printed Excerpts from Original Exhibits, pp. 2 to 21).

The Stock Yard Company refused to collect the additional 25 cents from the shippers or their consignees, and took the position—

1. That the duty of unloading live stock at the Union Stock Yards had always been recognized by the line-haul carriers as one of their duties;

2. That it sustained no such relation to the shippers which would warrant it in collecting said unloading charges from the shippers;

3. That the tariffs filed by it were not intended to and did not affect the shippers, but were restricted to charges to be collected by it from the line-haul carriers for services performed by it as agent for said line-haul carriers;

4. That the so-called unloading charge covered other services exclusively for the use and benefit of the line-haul carriers and in which the shippers could have no possible interest or benefit.

(Original Ex. 6, pp. 10-38; Printed Excerpts from Original Exhibits, pp. 2 to 21).

In accordance with this position the Stock Yard Company collected the freight bills of the line-haul carriers figured on the basis of the line-haul rates plus the $2.00 terminal charge specified in the published tariffs of the line-haul carriers. The Stock Yard Company then refused to collect the additional 25 cents per car from the consignees, because it was not set up on the freight bills of the line-haul carriers. The Stock Yard Company, however, withheld this 25 cents per car from money in its hands due the carriers. Thereupon the line-haul carriers threatened to collect their own freight bills in order to prevent the Stock Yard Company from withholding the additional 25 cents per car. (Original Ex. 6, pp. 472-476—Excerpts from Original Ex. pp. 37-40).

To settle the controversy, the Stock Yard Company and the line-haul carriers agreed upon the following practice: The line-haul carriers did not amend their tariffs (R. 390) but after making out their freight bills on the basis of the line-haul rates and said $2.00 terminal charge specified in their published tariffs, added to the amount of freight thus ascertained the additional charge not named in their tariffs of 25 cents per car; the freight bills thus made out were turned over by the line-haul carriers to their agent, the Stock Yard Company, who collected from the petitioners herein the amount of the freight charges figured on the basis of the line-haul and terminal charges specified in the original tariffs of the line-haul carriers, plus the additional 25 cents per car, and turned the entire amount over to the line-haul carriers. Thereafter, in the due course of business, the line-haul carriers paid the Stock Yard Company the amount of its unloading charges set forth in the new tariffs filed by the Stock Yard Company. (Original Ex. 6, pp. 472-476—Printed Excerpts from Original Exhibits, pp. 37-40; Original Ex. 6, pp. 10 to 38—

Printed Excerpts from Original Exhibits, pp. 2 to 21; Original Ex. 6, pp. 496, 497, 579—Printed Excerpts from Original Exhibits, pp. 40 to 41, 51 to 58). This is the practice referred to in the report of the Commission (R. 123), and the practice which was declared unlawful and unreasonable by the Commission (R. 145). The practice inaugurated by the Stock Yard Company and the line-haul carriers before the period of Federal Control was continued by the Director General of Railroads during the entire period of Federal Control (R. 217-218).

In its report of February 11, 1919, (R. 121 to 140) the Commission likened the unloading of live stock to the unloading of ordinary freight, and applies the same rules to both, holding that it was not the duty of the line-haul carriers to unload live stock at the Union Stock Yards (R. 138). After the case was reopened on rehearing a great mass of testimony was introduced before the Commission bearing on the question of whether it was the duty of the shipper or of the carriers to unload live stock at the Union Stock Yards in Chicago. We refer particularly to the hearings of May 20th, May 21st and May 22nd, 1919, shown by Original Ex. 7. At said hearings it was shown that the line-haul carriers repeatedly, in justifying the line-haul rates, or any established new line-haul rates, set up their obligation to unload live stock at the Union Stock Yards in Chicago and their right to include such expense as a part of the transportation charge. (See Original Ex. 7, p. 1053; *Board of Trade* v. *C. & A. R. R. Co.*, 3 I. C. C. 235; Original Ex. 7, p. 1044; *Chicago Live Stock Exchange* v. *C. G. W. Ry.*, 10 I. C. C. 428; Original Ex. 7, p. 1055; *Cattle Raisers' Ass'n* v. *Fort Worth and Denver City*, 7 I. C. C. 555a; Original Ex. 7, p. 1040); it was also shown at said hearings that continuously from the year 1867 the line-haul carriers in their line-haul rate always included at Chicago the expense of unloading stock at the Union Stock Yards as a part of

their line-haul rate, (Original Ex. 6, p. 438); that at the terminal markets at Sioux City, Omaha and Kansas City, the next largest in size to the market in the City of Chicago, the obligation to unload live stock had always been assumed by the line-haul carriers without any charge whatever against the shipper, except as the same was included in the line-haul rate (Original Ex. 7, pp. 1077 to 1085; Printed Excerpts from Original Exhibits, pp. 69 to 75); that for more than fifty years, by reason of an arrangement between the Stock Yard Company and the line-haul carriers, the line-haul carriers assumed the obligation of unloading live stock at the Union Stock Yards in Chicago and paid the Stock Yard Company directly for such service (Original Ex. 7, pp. 1023, 1212); Findings of Commission (R. 144.)

PETITIONERS PAID THE UNLAWFUL CHARGE.

In each instance where said increase of 25 cents per car was exacted from your petitioners, the same was paid out of the individual funds or moneys of said commission merchants and members of said Chicago Live Stock Exchange and later charged back against said individual shippers or deducted from the proceeds due to said individual shippers from said shipments, with the representation and assurance by said commission merchants and members of said Chicago Live Stock Exchange that they, in behalf of said shippers, would present to said Interstate Commerce Commission a claim for reparation for the use and benefit of said shippers. (Original Ex. 8, pages 25 to 96—pages 96 to 134; Original Exhibit 9, pages 21 to 685; see also Findings of Commission, R. 151.) Printed Excerpts from original Exhibits pp. 136 to 156; see also Rec. 329 to 331.

Andrew W. Mellon was, at the time of the commencement of this suit, the agent designated by the President,

pursuant to the provisions of Section 306 of the Transportation Act of 1920, against whom suits may be brought on causes of action arising out of the possession, use and operation by the President of the railroads and systems of transportation named in said Act (R. 236).

In its report of January 10, 1920, the Interstate Commerce Commission found that the stock yards were terminals for the receipt and delivery of live stock of the railroads utilizing them (R. 143); that for more than fifty years the line-haul carriers delivered live stock at the stock yards in Chicago and unloaded the same, making no separate charge therefor against the shipper, and that it was the duty of said line-haul carriers to unload and load live stock at the Union Stock Yards, Chicago; that the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, for years constituted the through charge and included delivery of live stock to the consignee at the stock yards (R. 144); that the Stock Yard Company was a common carrier engaged in interstate commerce, and that the services of unloading are a part of the transportation of live stock, and that the collection of separate charges for unloading, in addition to the published rates of the line-haul carriers on live stock from and to interstate points to and from the stock yards, was an unlawful and unreasonable practice (R. 145). Said order of the Commission found that reparation should be made on account of the exaction of said unlawful charges (R. 146).

The respondent Union Stock Yard & Transit Company, in its answer filed in the District Court, sets forth that it performed the unloading service for and on behalf of the carriers, and that its charges for such service were paid to it by the carriers (R. 23); that in unloading any shipments of live stock at said yards it was performing a service for and on behalf of the railroads hauling said live stock into and out of said yards and as their agent (R. 24).

The answer of respondent Director General of Railroads on this point admits that the unloading of live stock at said place was a part of the transportation of said live stock, but denies that such loading and unloading was a part of the transportation thereof furnished by carriers; that all charges made for such service in reference to live stock transported to and from said stock yards by said carriers were made by and paid to said Union Stock Yard & Transit Company (R. 34).

II.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. There is squarely raised by the decision of the Circuit Court of Appeals for the Seventh Circuit an important question of Federal law which has not been, but should be, settled by this Honorable Court. That question is: Where a carrier holds itself out in its published tariffs to transport live stock under through rates and charges for the complete transportation, including the unloading of such live stock, may an extra charge for a part of the unloading service be exacted from the shipper, either by the carrier or its agent, on the basis of a tariff published and filed by the agent of the line haul carrier increasing its charge for such unloading service, without the line haul carrier first amending its published tariff of rates and charges purporting to cover the entire service?

The Circuit Court of Appeals in its opinion in effect has answered this question in the affirmative.

(Please see separate brief in support of petition, p. 9).

2. Another important question of Federal law squarely raised by the decision of the Circuit Court of Appeals for the Seventh Circuit, which has not been, but which should be, settled by this Honorable Court is: May a common car-

rier engaged solely in performing terminal services as agent for another common carrier (where the latter in its published tariffs holds itself out to perform the entire through transportation service, including the terminal service, for certain rates and charges specified in its tariffs), so file its published tariffs as to restrict the application of the rates and charges therein to the common carrier for whom it as agent performs such terminal service? Or, stated in another way, may a common carrier engaged solely in the rendering of a terminal service to another line-haul carrier as its agent, lawfully file its tariffs of rates and charges as to make the same applicable only to the carrier for whom it is performing such service as agent?

The Circuit Court of Appeals in its opinion has in effect answered these questions in the negative.

(Please see separate brief in support of petition, p. 10).

3. Another important question of Federal law squarely raised by the decision of the Circuit Court of Appeals for the Seventh Circuit, which has not been, but which should be, settled by this Honorable Court, is: Does an absorption clause in the published tariffs of the line-haul carriers, to the effect that it will absorb and pay a certain portion of a terminal charge, such as the unloading of live stock, control and prevail over other portions of such published tariffs which undertake the performance of the entire transportation transaction including such unloading in consideration of the payment by the shipper of a fixed commodity charge plus a fixed terminal charge?

The Circuit Court of Appeals in its opinion has in effect held that in such case the "flat Chicago rate" plus the fixed $2.00 terminal charge in the published tariffs of the line-haul carriers must give way to such absorption clause.

(Please see separate brief in support of petition, p. 12).

4. The action of the Circuit Court of Appeals in ignor-

ing in its decision the finding of the Commission that "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for years constituted the through charge and included delivery of live stock to the consignee at the stock yards" (R. 144), and in substituting its judgment for that of the Commission, in holding that the classifications in the published tariffs of the line-haul carriers were controlling over the line-haul rates and said $2.00 terminal charge, was a clear departure from the accepted and usual course of judicial proceedings and from the rule well established by this court to the effect that where tariffs filed require consideration of matters of fact and application to expert knowledge for the ascertainment of the technical meaning of the rules and a correct appreciation of a variety of incidents affecting their use, the determination of the meaning of such tariffs calls for the exercise of the trained judgment of that body of experts appointed by law and informed by experience, namely, the Interstate Commerce Commission; that in such case the courts will respect and accept the finding of the Interstate Commerce Commission as to the meaning, force and effect of such tariffs. (*Standard Oil Co.* v. *United States,* 283 U. S. 235; *Illinois Central R. R.* v. *Interstate Commerce Commission,* 206 U. S. 441, at 454; *Great Northern Ry.* v. *Merchants Elevator Co.,* 259 U. S. 285.)

(NOTE: The tariffs filed by the line-haul carriers and the Stock Yard Company in this case were voluminous and complicated and of such a nature as to call for expert knowledge as to their meaning, force and effect. Such tariffs are set forth in Original Exhibit 1, certified to this court, a few excerpts from the same being included in Printed Excerpts from Original Exhibits, pp. 165, 167, 169 and 172. The classifications referred to in the opinion of the Circuit Court of Appeals (R. 397) contained the same requirements that had been in the classifications for many

years; they were not specifically published shortly before this case arose, to apply at the Chicago market, as might be inferred from the opinion of the Circuit Court of Appeals.) Where official tariffs apply at a particular point as was the case at Chicago, said tariffs by their terms supersede the classification.

(Please see separate brief in support of petition, pp. 6, 7, 12, 13).

5. The action of the Circuit Court of Appeals in refusing to respect and accept the finding of fact by the Interstate Commerce Commission that it was the duty of the carriers to unload live stock consigned over the lines of the line-haul carriers to the Union Stock Yards at Chicago, and in substituting its judgment for that of the Commission on that subject, and holding (R. 397-398) that it was the duty of the shipper to unload his own live stock at the Union Stock Yards, or to directly pay respondent Union Stock Yard & Transit Company for performing such service a charge in addition to the amount set up in the line-haul rates and in the $2.00 terminal charge of the line-haul carriers covering said service, was a departure from the accepted and usual procedure of the courts in this kind of a case and directly contrary to the views expressed by this court in *United States* v. *Union Stock Yards,* 226 U. S. 286, *Covington Stock Yards Co.* v. *Keith,* 139 U. S. 128, *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541, and *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441.

(Please see separate brief in support of petition, pp. 7-8).

6. The conclusion of the Circuit Court of Appeals that the additional charge of 25 cents per car for unloading was, in effect, collected by the Stock Yard Company (R. 396), though ingenuous, is contrary to the answer of the respondent Union Stock Yard & Transit Company (R. 23-24) and contrary to all of the facts in the case (Printed Ex-

cerpts from Original Exhibits, pp. 21 to 26, 34, 35, 38, 39, 40, 41, 52, 53, 54, 55, 56, 57, 165). Furthermore, the conclusion of the Circuit Court of Appeals that "notwithstanding the seeming circuity it was the Stock Yard Company which in effect collected the charge from the shipper or consignee," does not answer the proposition that since the service of unloading live stock was a service which the line-haul carriers in their published tariffs then on file held themselves out to perform for the rates and charges therein specified, the exaction from the shipper of any amount in excess of the published rates and charges of the line-haul carriers, by means of the unreasonable and unlawful joint practice referred to by the Commission (R. 123) and condemned by it (R. 144-145), rendered said line-haul carriers and said Stock Yard Company jointly and severally liable to your petitioners, regardless of which of them actually collected the money.

Lewis v. *Southern Pacific Co.*, 283 U. S. 654, at page 660.

See also *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, and *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217.

(Please see separate brief in support of petition, pp. 17-18).

7. The conclusion of the Circuit Court of Appeals (R. 398) that the increased charge of 25 cents per car was justified by reason of the extraordinary conditions existing at the time said charges were collected on account of the increased cost of labor and other expenses in connection with the unloading of live stock, is a clear departure from the accepted and usual course of judicial proceedings in a case of this kind, for the reason that the rule is well established in this court and other Federal courts that courts are not only powerless to make rates, but are powerless to determine what are or are not reasonable causes for increasing

rates, such questions being committed by the Interstate Commerce Act to the judgment and wisdom of the Interstate Commerce Commission. (See *Los Angeles Switching Case,* 234 U. S. 294, at pages 310 and 311; *Interstate Commerce Commission* v. *Delaware, L. & W. R. R. Co.,* 220 U. S. 235; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 232 U. S. 199; *Northern Pacific Co.* v. *Solum,* 247 U. S. 477.)

(Please see separate brief in support of petition, pp. 18-20).

8. The action of the Circuit Court of Appeals in affirming the judgment of the District Court has sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings in a case of this kind; by the affirmation of the judgment of the District Court the published opinion in that case has the effect of law and precedent. The point on which the District Court decided this case (R. 67 to 77) is in direct conflict with the established practice adopted by the Commission in the *Missouri Portland Cement Co.* case, 88 I. C. C. 492, *Legel Oil & Gas Co.* v. *Chicago & North Western Ry. Co.,* 179 I. C. C. 57, and in the forty or fifty other cases referred to in the opinion of Judge Woodward (R. 69), based on the principles of law and rule announced by this Honorable Court in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.,* 245 U. S. 531, and adhered to in *Louisville & N. R. R. Co.* v. *Sloss-Sheffield Co.,* 269 U. S. 217, and *Lewis* v. *Southern Pacific Co.,* 283 U. S. 654.

The decision of Judge Woodward in the District Court, sanctioned by the judgment of the Circuit Court of Appeals, is also in direct conflict with the uniform practice established by the Commission for many years with reference to the right of factors, representatives and agents to maintain reparation proceedings under the interpretation given the Interstate Commerce Act by the Interstate Com-

merce Commission, and supported by principles announced by this Honorable Court in *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, and *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 423. (*Legel Oil & Gas Co.* v. *Chicago & North Western Ry. Co.*; 179 I. C. C. 59; *Texas Live Stock Shippers Protective League* v. *Director General*, 139 I. C. C. 448; *Western Electric Co.* v. *Director General*, 87 I. C. C. 545; *Detroit Coal Exchange* v. *Director General*, 80 I. C. C. 258; *Memphis Freight Bureau* v. *St. Louis-San Francisco Ry. Co. and Director General*, 57 I. C. C. 212; *Hercules Powder Co.* v. *New York Central R. R. Co. and Director General*, 78 I. C. C. 55.)

The rule so announced by the District Court and sanctioned by the Circuit Court of Appeals is also directly contrary to the decisions of other District Courts, namely *Arcadia Mills* v. *Carolina C. & O. Ry.*, 293 Fed. 639; *Merchants & Manufacturers Traffic Ass'n* v. *United States*, 231 Fed. 292; *Consolidated Cut Stone Co.* v. *Atchison, T. & S. F. Ry. Co.*, 39 Fed. (2d) 661.

(Please see separate brief in support of petition, pp. 20-25).

III.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court to the Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Honorable Court on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered on its docket 4462, and entitled George J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen, *et al.*, *vs.* Andrew W. Mellon, Director General of Railroads, and Union Stock Yard & Transit Company; to the end that said cause may

be reviewed and determined by this Honorable Court as provided for by the statutes of the United States, and that the said judgment of said Circuit Court of Appeals for the Seventh Circuit be reversed and that your petitioners may have such other and further relief as this Honorable Court may deem proper.

FRANKLIN J. STRANSKY,
CLAIR R. HILLYER,
JAMES P. CAREY, JR.,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,

Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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SUBJECT INDEX.

PAGE

I. Opinions of the Courts below 1

II. Jurisdiction 2

III. Statement of the Case 2

IV. Specification of Errors 3

V. Argument:

I. The finding of the Commission that it was the duty of the line-haul carrier to unload live stock at the Union Stock Yards was essentially one concerning an administrative matter, inseparably connected with the rate-making power and functions of the Commission. There being an abundance of evidence in the record to support the finding of the Commission on that subject, the Circuit Court of Appeals should not have substituted its judgment for that of the Commission on that question. The unloading service at the Union Stock Yards was a service which the carriers in their published tariffs held themselves out to perform, and for which their rates provided compensation. The only possible way in which the cost of that service to the shipper could be lawfully increased would be by compliance with paragraph 3 of Section 6 of the Interstate Commerce Act with reference to changes in rates, fares and charges 5-11

II. The Circuit Court of Appeals was wrong in holding that the absorption clause in the published tariffs of the line-haul carriers constituted the limit of the line-haul carriers obligation to pay any part of the unloading service 11-12

III. In holding that the classifications and provisions of the Uniform Live Stock Contract incorporated in the published tariffs of the line-haul carriers were controlling over the line-haul rates to Chicago, plus the $2.00 terminal charge, the Circuit Court of Appeals overlooked the proposition that in a case such as this, concerning unusually complicated and technical tariff situations, the determination of such questions calls for the exercise of the trained judgment of that body of experts appointed by law and informed by experience. The holding of the Circuit Court of Appeals that the classifications referred to in its opinion prevailed and controlled over the line-haul rates, plus the $2.00 terminal charge, is in conflict with other Federal authorities on that question and in conflict with the undisputed testimony in this case.....12-15

IV. The holding of the Circuit Court of Appeals that the Stock Yard Company was compelled under the law to collect the full charges specified in their published tariffs, does not answer the proposition that the Stock Yards Company had no right to combine with the line-haul carriers, in order to settle a controversy between themselves, in the promulgation of a practice whereby there was exacted from the shipper an extra charge of 25 cents per car in addition to the line-haul rates, plus the $2.00 terminal charge, which included said unloading charge.....15-17

V. The holding of the Circuit Court of Appeals that the Stock Yard Company in effect collected the additional 25 cents per car in question, is not justified by the facts in this case, and the court should have accepted the finding of the Commission as to that fact. Furthermore, the joining of the Stock Yard Company with the line-haul

carriers in the promulgation of a practice which resulted in the exaction from the shipper of a charge in addition to the charges specified in the published tariffs of the line-haul carriers, was a wrongful and tortious act, which rendered the line-haul carriers and the Stock Yard Company jointly and severally liable, regardless of which of them actually received the money or the benefit thereof 17-18

VI. The Circuit Court of Appeals had no authority or jurisdiction to inquire into the determination of the reasonableness or the justification of the extra 25 cents per car exacted from the shipper through the practice condemned by the Commission..... 18-20

VII. The decision of the District Court holding that petitioners had no right to maintain the proceedings before the Commission, and had no right to prosecute the suit in the District Court was given the effect of law and precedent by the affirmance by the Circuit Court of Appeals. That case upsets the established practice of the Commission in sixty or seventy cases, and has raised anew doubt and dissension among the members of the Commission as to the law on this subject and should be settled by this Honorable Court. The ruling of the District Court is not only contrary to the repeated holdings of the Commission, but to the holdings of this court and many other Federal courts..... 20-25

Table of Cases Cited.

Page

Adams & Kitchen, et al. v. Andrew W. Mellon, Director General of Railroads, etc., et al. (C. C. A. 7) 51 Fed. (2nd) 620 1

Adams & Kitchen, et al. v. Andrew W. Mellon, Director General of Railroads, etc., et al., 39 Fed. (2nd), 80 (U. S. D. C.) 1, 20

Arbuckle Case, 231 U. S. 274..... 9

Arcadia Mills v. Carolina, C. & O. Ry., 293 Fed. 639..... 24

Atchison, T. & S. F. Ry. v. United States, 232 U. S. 199.... 7

Cattle Raisers' Ass'n of Texas & Chicago Live Stock Exchange v. Chicago, R. & Q. R. R. Co., 10 I. C. C. 83.... 24

Commercial Club of Omaha v. Anderson, et al. Ry. Co., 41 I. C. C. 480..... 24

Covington Stock Yards v. Keith, 139 U. S. 128..... 8

Davis v. Portland Seed Co., 264 U. S. 403.....9, 12

Detroit Coal Exchange v. Director General, 80 I. C. C. 258. 24

Doughty-McDonald Grocery Co. v. Atchison, T. & S. F. Ry. Co., 155 I. C. C. 47.....22, 23

Edgerton v. Chicago, R. I. & P. Ry. Co., 240 Ill. 311..... 23

Finn v. Western R. R. Co., 112 Mass. 524..... 23

Galveston, etc. Ry. Co. v. Lykes Bros., 294 Fed. 968..... 14

General Grinding Wheel Corporation v. Southern R. R. Co., 169 I. C. C. 83..... 21

Hercules Powder Co. v. New York Central R. R. Co., et al., 78 I. C. C. 55..... 24

Hooper v. Chicago & N. W. Ry. Co., 27 Wis. 81..... 23

	Page
Independent Refiners Ass'n v. Western N. Y. & Pa. R. R. Co., 6 I. C. C. 378	24
Interstate Commerce Commission v. Baird, 194 U. S. 25	24
Interstate Commerce Commission v. Chicago, B. & Q. R. R. Co., 186 U. S. 320	20
Interstate Commerce Commission v. Delaware, L. & W. Ry. Co., 220 U. S. 235	18
Interstate Commerce Commission v. Louisville & N. R. R., 227 U. S. 88	7
Interstate Commerce Commission v. Stickney, 215 U. S. 98	11, 15
Lewis v. Southern Pacific Co., 283 U. S. 654	18
Louisville & N. R. Co. v. Sloss-Sheffield Co., 269 U. S. 217	18, 22
Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412	22
Memphis Freight Bureau v. St. L.-S. F. Ry. Co., et al., 57 I. C. C. 212	24
Michigan Hardwood Mfrs. Ass'n v. Transcontinental Freight Bureau, 27 I. C. C. 32	24
Missouri Portland Cement Co. v. Director General, 88 I. C. C. 492	20
New Haven R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361	22
New York Central & Hudson River Ry. Co. v. York & Whitney, 256 U. S. 406	22
N. W. Steel Co. v. Director General, 68 I. C. C. 195	15
Pacific Rice Mills Co. v. Director General, 78 I. C. C. 459	15
Phillips Co. v. Grand Trunk R. R. Co., 236 U. S. 662	24
Procter & Gamble v. United States, 225 U. S. 282	18
Robinson v. Baltimore & Ohio Ry., 222 U. S. 506	9

Page

Southern Express v. Kraft, 49 Miss. 480 23
Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531 ..... 18, 20, 22
Southern Pacific Co. v. Lothrop, 15 Fed. (2d) 486 15
Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117 ..... 22, 24
Standard Oil Co. v. United States, 283 U. S. 235 ..... 13, 18, 21
Sutherland Flour Mills Co. v. Director General, 81 I. C. C. 365 15

Tanners' Council of the U. S. v. Director General, 78 I. C. C. 27 24
Texas Live Stock Shippers' League v. Director General, 139 I. C. C. 448 24

Union Pacific R. R. Co. v. American Smelting & Refining Co., 202 Fed. 720 23
Union Pacific R. Co. v. Updike Co., 178 Fed. 223, Affd. 222 U. S. 215 10
United States v. Balt. & O. Ry., 231 U. S. 274 9
United States v. Erie R. R. Co., 280 U. S. 103 25
United States v. Louisville & N. R. R. Co., 235 U. S. 314 .. 18
United States v. Miller, 223 U. S. 599 ..... 9, 12
United States v. Pacific & A. R. and Nav. Co., 228 U. S. 87 8
United States v. Union Stockyard Co., 226 U. S. 286 8

Virginia Ry. v. United States, 272 U. S. 568 25

Warehouse Co. v. United States, 283 U. S. 501 9
Western Chemical Co. v. United States, 271 U. S. 268 ..... 7, 25
Western Electric Co. v. Director General, 87 I. C. C. 545 .. 24
Winne v. Hammond, 37 Ill. 99 22

TABLE OF STATUTES CITED.

43 Stat. 938 2
Interstate Commerce Act, Sec. 6, par. 3 8
Judicial Code, Sec. 240 2
Transportation Act, Secs. 13, 14, 16 24
28 U. S. C. A., Sec. 347 2

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. .....

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,

Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the Northern District of Illinois, Eastern Division, is reported in 39 Fed. (2d), 80. The opinion of the Circuit Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court, is reported in 51 Fed. (2d) 620.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is July 27, 1931 (R. 389). The order denying the petition for rehearing was filed September 22, 1931 (R. 409).

2. This review is sought under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Sec. 347.

3. The instant case is a civil one heard and determined in the Circuit Court of Appeals for the Seventh Circuit upon appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division, and involves the administration, construction, application and interpretation of the Interstate Commerce Act, a Federal statute.

III.

STATEMENT OF THE CASE.

The statement of facts in the petition herein, under paragraph 1, is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

1. Said Circuit Court of Appeals should have accepted the finding of the Commission that "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for many years constituted the through charge and included delivery of live stock to the consignee at the stock yards," and the further finding of the Commission that the collection of the separate charges from the complainants "was an unlawful and unreasonable practice," instead of ignoring said findings of the Commission and substituting its own finding to the effect that the classifications in the published tariffs of the line-haul carriers were controlling over the line-haul rates and the terminal charge.

2. Said Circuit Court of Appeals should also have accepted the finding of the Commission that the practice resorted to by respondents to collect from the shipper the extra 25 cents per car was an unlawful and unreasonable practice.

3. Said Circuit Court of Appeals erred in holding that the increased charge of 25 cents per car was justified by reason of the extraordinary conditions existing at the time said charges were collected and on account of the increased cost of labor and other expenses in connection with said unloading, and was properly the subject of an increased unloading charge outside of and beyond that which was otherwise included in the line-haul carriers' published transportation rates, for the reason that said court was without jurisdiction to determine whether or not said increase was reasonable or justifiable.

4. Said Circuit Court of Appeals erred in not accepting as conclusive the findings of the Commission based on sufficient evidence, that the duty of unloading live stock at the Union Stock Yards was that of the line-haul carriers, and in substituting its judgment for that of the Commission in holding that such duty was on the shipper.

5. Said Circuit Court of Appeals erred in finding that the collection of the charges complained of in this case was made by the Stock Yard Company, and in holding that such fact absolved the line-haul carriers from any liability to the shipper arising out of the exaction of the additional charge for unloading through the practice adopted by the line-haul carriers and the Stock Yard Company to exact said charge from the shipper.

6. Said Circuit Court of Appeals erred in holding that the practice by which the line-haul carriers and the Stock Yard Company exacted said increased unloading charge was lawful, because the Stock Yard Company's published tariffs compelled the Stock Yard Company to collect the 25 cents additional unloading charge and obviated the necessity of the line-haul carriers changing their published tariffs on file by showing such increase.

7. Said Circuit Court of Appeals erred in affirming the judgment of the District Court predicated on the theory that plaintiffs had no right to maintain the proceedings in question before the Interstate Commerce Commission and to prosecute said suit in the District Court.

V.

ARGUMENT.

Point I.

As we view this case, one of the outstanding questions presented and which the Circuit Court of Appeals lost sight of, is whether the unloading service at the Union Stock Yards was a service which the carriers in their published tariffs held themselves out to the public to perform and for which service compensation was provided for in the rates and charges set forth in said tariffs. A tariff schedule is made up of two parts: first, the service which the carrier holds itself out to the public to perform; second, its rates and charges for that service. It is obvious that any change in the service to be performed, *or any change in the extent of such service,* is equally as important and within the purview of Section 6 of ths Interstate Commerce Act as a change in the rates and charges specified for such service, and requires a corresponding change in the tariff schedules.

That the service of unloading live stock at the Union Stock Yards was a service which the line-haul carriers held themselves out to the public to perform, and for which service they were compensated by their line-haul rates and the $2.00 terminal charge, admits of no doubt. For more than fifty years prior to the commencement of the controversy in this case, the line-haul carriers hauling live stock to the Chicago market unloaded live stock at the Union Stock Yards and made no charge therefor against the shipper (R. 144). When the Interstate Commerce Act was enacted, the line-haul carriers included in their line-haul rates and terminal

charges in their published tariffs compensation to themselves for such unloading service. The line-haul carriers never at any time directly performed such unloading service, but by contract with the respondent Stock Yard Company an arrangement was made whereby the Stock Yard Company, as agent for the line-haul carriers, and for a consideration fixed in such contract, performed such service. After the passage of the Interstate Commerce Act, and after the Stock Yard Company was compelled to publish tariff schedules showing its rates and charges for the services performed by it, the arrangement between the line-haul carriers and the Stock Yard Company continued the same as before, with the exception that the charges of the Stock Yard Company to the line-haul carriers for the unloading service was fixed in the tariffs of the Stock Yard Company instead of by contract, as formerly.

Immediately after the Stock Yard Company was compelled to publish its tariff schedules, the line-haul carriers caused to be inserted in their tariff schedules a so-called absorption clause, in which it was in effect stated that said carriers, without further charge to the shipper than the charges contained in the line-haul rates and in the $2.00 terminal charge, would pay the unloading charges of the Union Stock Yard & Transit Company, specifically mentioning the amount of such charges. After the Stock Yard Company, on May 21, 1917, had filed new tariff schedules increasing both its loading and unloading charges by 25 cents per car, the line-haul carriers made no change whatever, either in their line-haul rates, the $2.00 terminal charge, *or the language of the so-called absorption clause.* With the evident purpose of obviating the necessity of changing its published tariffs, whereby they probably would be subjected to objections from the public and hearings

before the Commission to inquire into the reasonableness of their rates, the line-haul carriers, to settle the controversy which had arisen between them and the Stock Yard Company concerning who should pay the additional 25 cents per car called for in the increased tariff schedules of the Stock Yard Company, combined with the Stock Yard Company to exact the additional 25 cents per car from the shipper by the circuitous and indirect means condemned by the Commission.

The Interstate Commerce Commission, after the consideration of the testimony of nearly 100 witnesses and a great mass of documentary evidence, decided that such practice was unreasonable and unlawful and that the parties to said practice should make reparation to the petitioners in this cause from whom they received the unlawful charges in question.

The question of whether it was the duty of the shipper or of the line-haul carrier to unload live stock at the Union Stock Yards in Chicago was essentially an administrative matter, inseparably connected with the rate-making power and functions of the Commission. There being an abundance of evidence in the record to support the finding of the Commission that the duty of unloading such live stock at the Union Stock Yards was on the line-haul carriers, the Circuit Court of Appeals should not have substituted its judgment for that of the Commission on that subject. (*Western Chemical Co.* v. *United States*, 271 U. S. 268; *Interstate Commerce Commission* v. *L. & N. R. R.*, 227 U. S. 88.) The matter of determining whose duty it was to unload live stock at the Union Stock Yards was a matter "committed to the decision of the administrative body, which in each instance is required to fix reasonable rates and establish reasonable practices." (*Atchison, T. & S. F. R. R.* v. *United States*, 232 U. S. 199, at page 221.)

The purpose of the Transportation Act was to establish a tribunal to determine the relation of communities, shippers and carriers, and to fix their respective rights and obligations. *U. S.* v. *Pacific and A. R. and Nav. Co.*, 228 U. S. 87.

The holding of the Circuit Court of Appeals that it is the duty of the shipper of live-stock generally to unload his live-stock at the Union Stock Yard in Chicago, is "in the teeth" of the holdings of this Court in *United States* v. *Union Stockyard Co.*, 226 U. S. 286 at 304, and *Covington Stock Yards* v. *Keith*, 139 U. S. 128-136. While the holding of the Circuit Court of Appeals on this question was clearly erroneous, even if correct, it would not be necessarily decisive of this case,—because even if this duty, as a general proposition of law, was one incumbent on the shipper, the line-haul carriers by undertaking in their published tariffs to perform such duty through their agent and in including in such tariffs compensation therefor are bound to stick by such published tariffs.

It is manifest that if the line-haul carriers in their published tariffs held themselves out to the public as performing the unloading service in question at the Union Stock Yards, and the rates and charges in such published tariffs contained compensation to the line-haul carriers for such service, the only possible way in which the cost of that service to the shipper could lawfully be increased would be to comply with paragraph 3 of Section 6 of the Interstate Commerce Act, which provides:

> "No change shall be made in the rates, fares and charges, or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public, published as aforesaid, which shall plainly state the changes proposed to be

made in the schedule then in force and the time when the changed rates, fares and charges will go into effect."

See *United States* v. *Miller*, 223 U. S. 599; *Robinson* v. *Baltimore & Ohio*, 222 U. S. 506-508; *Davis* v. *Portland Seed Co.*, 264 U. S. 403, at page 425.

It is admitted that the line-haul carriers made no attempt, after the Stock Yard Company had increased its charge to them for the unloading service, of complying with the provisions of the paragraph above quoted. The first question which arises then is: Where a line-haul carrier performs certain terminal services in connection with the transportation of live stock through an agent which happens to also be a common carrier, and such agent increases its charges to the carrier for the performance of such service and files its published tariffs accordingly, does the filing of such tariffs by the agent inure to the benefit of the carrier, so that the carrier may lawfully, without changing its own published tariffs, join with the agent in a practice whereby there is exacted from the shipper an amount over and above the amount specified in the published tariffs of the line-haul carrier?

It would seem that the answer to this question should be obvious. The shippers in this case sustained no relation whatever to the Stock Yard Company, and there was no privity of contract between such shippers and the Stock Yard Company. *The Stock Yard Company issued no waybill or bill of lading. Its activities were limited to the performance of a terminal service for the line-haul carriers and as their agent.* (See *Warehouse Co.* v. *United States*, 283 U. S. 501 at p. 506-508; Arbuckle case (*United States* v. *Balt. & O. Ry.*, 231 U. S. 274.) There is no evidence in the record in this case that the published tariffs of the Stock Yard Company were on

file in the offices of the line-haul carriers so that the shipper doing business with the line-haul carriers could see and examine the same, as the Interstate Commerce Act requires in all cases where the shipper is to be bound by the terms and provisions of a published tariff.

We insist that the Interstate Commerce Act has not changed or abrogated the rules of the common law with reference to the relation of principal and agent between persons and corporations classified as common carriers, except as expressly changed by the Act. *Union Pac. R. Co.* v. *Updike Co.*, 178 Fed. 223, affirmed in 222 U. S. 215; that the requirement of the Transportation Act that all common carriers must publish tariffs of their rates and charges, does not mean that one common carrier as principal, agreeing with the shipper to transport and unload his live stock at the Union Stock Yards, may not contract with another common carrier performing the unloading services to pay the latter its charges for such service, and that such agent common carrier may not so restrict its published tariffs for the service to be performed by it for its principal as not to affect the shipper, but only to affect its principal for whom it renders the service; that there is nothing in the Interstate Commerce Act which indicates that it was the intent of Congress that the reciprocal rights and interests of the shippers and of the line-haul carriers, growing out of the published tariffs of the line-haul carriers, might be automatically changed by the filing of new tariffs by an agent of the line-haul carriers performing some terminal service for the line-haul carriers which the latter in their published tariffs held themselves out to the public as performing.

In order to sustain the decision of the Circuit Court of Appeals it must be held that the filing by the Stock Yard Company on May 21, 1917, of new tariff schedules,

to which the line-haul carriers were not parties, increasing the amount of their charges for the unloading service, automatically changed and modified the reciprocal rights of the shippers growing out of the published tariffs of the line-haul carriers.

Point II.

The Circuit Court of Appeals was also probably wrong in holding that the absorption clause in the published tariffs of the line-haul carriers constituted the limit of the line-haul carriers obligation to pay any part of the unloading service. It is clear that the total compensation to the carriers for the entire transportation of cattle to the Union Stock Yards, including unloading, was contained in their line-haul rates and/or in the $2.00 terminal charge, and the Commission so found. (R. 144) The absorption clause neither added to nor detracted from the service specified in the tariffs or the rates and charges specified for such service. It was merely a gratuitous or explanatory statement in the tariffs meaning no more than if it had stated that the carriers would absorb the charges of all carriers performing the services covered by the terminal charge of $2.00. If the so-called absorption clause had been entirely omitted the legal effect of the tariffs of the line-haul carriers would have been exactly the same. It would have been implied, in the absence of a statement to the contrary, that the line-haul rates, plus the $2.00 terminal charge, covered every service incidental to the transportation of the live stock to the Union Stock Yards, including unloading.

The case of *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, is directly in point. There the court, on page 105, says:

"The carrier is under no obligations to charge for

terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and commission that it is insisting upon it."

The absorption clause added no obligation or duty on the part of the carriers which was not already included in the tariff. The meaning, object and purpose of the absorption clause must be determined in the light of its surrounding facts. It is clear that at the time such absorption clause was first put into the tariff schedules of the line-haul carriers, it was the intent of the carriers to absorb the entire unloading charge. There is nothing to indicate that at that time such clause was intended as a limitation upon the amount which the line-haul carriers would pay their agent, the Stock Yard Company, for performing for them the unloading service. When first put into the published tariffs of the line-haul carriers it coverd the entire obligation and charge of the unloading service. The only possible way in which that situation could be changed as between the shipper and the line-haul carriers would be by a change in the published tariffs of the line-haul carriers, specifically stating that the line-haul carriers in the future, instead of paying the entire charges of the Stock Yard Company, as in the past, would only pay a part of such charges.

Davis v. *Portland Seed Co.* 264 U. S. 403, at p. 425.

United States v. *Miller,* 223 U. S. 599-605.

Point III.

In holding that the classifications and provisions of the Uniform Live Stock Contract incorporated in the published tariffs of the line-haul carriers were controlling on the question of whether it was the duty of the line-haul carriers or of the shippers to unload live

stock at the Union Stock Yards in Chicago, the Circuit Court of Appeals set at naught the finding of the Commission (R. 144) that "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for years constituted the through charge and included delivery of live stock to the consignee at the stock yards." The record in this case shows that the tariffs involved in this proceeding were extremely voluminous and complicated. We invite the attention of the court to Original Exhibit 1, where such tariffs are contained.

This court recently in *Standard Oil Co.* v. *United States*, 283 U. S. 235, at page 236, used language which is particularly appropriate to the question here under discussion. There this court says:

> "The case before the Commission did not, as contended, involve merely the construction of the written words employed in a rate tariff—a simple question of law; but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use. It is evident from an inspection of the record, as the Commission in its first report said, that 'both cases concern unusually complicated and technical tariff situations,' the proper determination of which called for the exercise of the trained judgment of that body of experts, 'appointed by law and informed by experience.' *Illinois Central etc. R. R.* v. *Inter. Com. Comm.*, 206 U. S. 441, 454, 27 S. Ct. 700, 51 L. Ed. 1128. And to that body, in the interest of uniformity, the determination must be left."

The holding of the Circuit Court of Appeals that the classifications and provisions of the Uniform Live Stock Contract were determinative of the question of whether it was the duty of the line-haul carriers to unload live stock at the Union Stock Yards in Chicago, or whether it was the duty of the shippers to perform such service,

being in direct conflict with the holding of the Commission on that subject, was tantamount to a statement that the Interstate Commerce Commission was unable or incompetent to determine the meaning, force and effect of railroad tariffs. The Circuit Court of Appeals in so holding also completely overlooked the well-established proposition that the line-haul or commodity tariffs specifically naming rates and charges between particular points take precedence over the classification tariff which names no specific rates or points.

In *Galveston, etc. Ry. Co.* v. *Lykes Bros.*, 294 Fed. Rep. 968, the court, on page 971, says:

> * * * "it is a matter too well settled by the rules of the Commission, affirmed by the courts, that where a commodity rate is made in the tariff such commodity rate is the lawful rate and the only rate that can be used; the class rates are by it superseded."

The record in this case shows conclusively that the classifications referred to by the Circuit Court in its opinion did not apply at the Union Stock Yards, Chicago. (Excerpts from Original Exhibits 167 to 172) The record in this case also conclusively shows the establishment by the tariffs of the line-haul carriers of line-haul rates to Chicago, which line-haul rates, plus a charge of $2.00 for terminal or switching service, as the Commission holds, "constituted the through charge and included delivery of live stock to the consignee at the Stock Yards." These classifications referred to by the Circuit Court in its opinion were not new, but were contained in every tariff schedule filed by the line-haul carriers from the time they were required to file such schedules by the Interstate Commerce Act.

That there was a specific line-haul or commodity rate to the Union Stock Yards at Chicago is clearly shown by

the record in this case (See Printed Excerpts from Original Exhibits, pp. 167, 169, 171, 172). We invite attention particularly to the testimony of H. W. Beyers, Assistant Freight Traffic Manager, Chicago & North Western Railroad. (Printed Excerpts from Original Exhibits, p. 171). It should also be noted that in the tariff schedules of the line-haul carriers the "Union Stockyards, Ill." is specifically named as a station to which the base rate is applied. (Excerpts from Original Exhibits p. 167)

The court in this connection further completely overlooked the rule that if there was any ambiguity in the tariff schedules published by the line-haul carriers, such tariffs must be construed most favorably to the shipper and against the line-haul carriers. (*Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98, at page 105; *Southern Pacific Co.* v. *Lothrop,* 15 Fed. (2d) 486; *Sutherland Flour Mills Co.* v. *Director General,* 81 I. C. C. 365; *N. W. Steel Co.* v. *Director General,* 68 I. C. C. 195; *Pacific Rice Mills Co.* v *Director General,* 78 I. C. C. 459.)

Point IV.

The Circuit Court of Appeals in holding that the Stock Yard Company was compelled under the law to collect from the shippers the full amount of their charges specified in their published tariffs, was also probably in error. As above stated, the Stock Yard Company sustained no relation, contractual or otherwise, to the shippers. There was no privity of contract or relation between the Stock Yard Company and the shippers. The Stock Yard Company in filing its tariffs did so "as a carrier's agent" for the purpose of restricting the operation of such tariff to the line-haul carriers for whom it per-

formed the unloading service. The words "as a carrier's agent" in the published tariffs of the Stock Yard Company cannot be disregarded. Such words were clearly intended to convey the meaning that the rates and charges contained in the published tariffs of the Stock Yard Company were meant to apply to the line-haul carriers and were not to affect the shipper. Such at all times was the intention and position of the Stock Yard Company during the controversy which arose between it and the line-haul carriers concerning the manner of the handling of the collection of the extra 25 cents per car, and at the hearings before the Commission. (See Printed Excerpts from Original Exhibits, pp. 2 to 21, 34 to 36, 54 to 56) If the line-haul carriers were compelled under the law to collect the 25 cents per car in question from the shippers, then why were they not compelled to collect the entire amount from the shippers? There is no authority to be found in the books for the splitting of a tariff charge so as to allow a part of the charge for a given service to be collected from the shipper and a part from the line-haul carrier. If the service in question is with reference to a service or duty which it is incumbent upon the shipper to perform, then the entire charge must be against the shipper. On the other hand, if the service or duty performed is that of the line-haul carrier, for which service it is compensated for in its line-haul rates and/or its published terminal charge, a part of such service or duty or charge therefor cannot be imposed on the shipper.

Conceding that it was the duty of the Stock Yard Company under its published tariffs to collect the entire amount of its increased charges for the loading and unloading service from the line-haul carriers, it does not follow that it was the duty of the Stock Yard Company to cooperate with the line-haul carriers in the promul-

gation of a practice whereby the shipper was compelled to pay for the transportation and unloading of his live stock an amount in excess of the amount for which the line-haul carriers in their published tariffs undertook to perform such service, and whereby respondents settled a controversy between themselves as to the extra 25 cents per car by exacting it from your petitioners.

Point V.

The ingenuous reasoning of the Circuit Court of Appeals for its conclusion that "notwithstanding the seeming circuity it was the Stock Yard Company which in effect collected the charge from the shipper or consignee," does not answer the contention made by petitioners that even though the Stock Yard Company may have been obligated under the Interstate Commerce Act to collect the full amount of the charges specified in their published tariffs, that circumstance did not justify the Stock Yard Company in joining with the line-haul carriers, in order to settle a controversy between them, in the promulgation of a practice whereby there was exacted from the shipper an amount in excess of the rates and charges specified in the published tariffs of the line-haul carriers for performing for the shipper the entire transportation of live stock to the Union Stock Yards, including the unloading thereof. If the Stock Yard Company was in duty bound under the law to collect the full amount of its published rates and charges, it should have collected the same from the line-haul carriers for whom it performed the services in question, in accordance with the intent of its published tariffs. The joining of the Stock Yard Company with the line-haul carriers in the promulgation of a practice which resulted in the exaction from the shipper of a charge in addition to

the charges specified in the published tariffs of the line-haul carriers was a wrongful and tortious act, which rendered the line-haul carriers and the Stock Yard Company jointly and severally liable regardless of which of them actually received the money or the benefit thereof. (*Lewis* v. *Southern Pacific Co.*, 283 U. S. 654; *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531; *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217.)

Point VI.

It requires little argument to show that the finding of the Circuit Court of Appeals that the extra charge of 25 cents per car for the unloading service was justified because of extraordinary conditions existing at the time said charges were collected and on account of the increase in the cost of labor and other costs of service at that time.

The rule is well established that courts are without power to make rates or to determine what is or is not a reasonable rate or a justification for an increase in a rate. Such matters are vested exclusively in the Interstate Commerce Commission, and the determination of the Commission on such questions are conclusive and not subject to review by the courts, unless the Commission acted arbitrarily or without evidence to support its conclusions, or that it transcended its constitutional or statutory powers. (*Standard Oil Co.* v. *United States*, 283 U. S. 235; *Interstate Commerce Commission* v. *Delaware, L. & W. Ry. Co.*, 220 U. S. 235; *United States* v. *Louisville & N. R. R. Co.*, 235 U. S. 314; *Procter & Gamble* v. *United States*, 225 U. S. 282 at p. 296 to 298.)

There never has been any contention in this case that the findings of the Interstate Commerce Commission

were not sustained by the evidence, nor is there any such intimation in the opinion of the Circuit Court of Appeals; nor does that court intimate that the Commission in this case transcended its constitutional or statutory powers. The opinion of the Circuit Court of Appeals is based entirely on these propositions (1) that it does not agree with the Interstate Commerce Commission as to its interpretations of the tariffs involved in this case; (2) that it does not agree with the findings of the Commission on questions of fact pertaining to whose duty it is to load and unload live stock at the Union Stock Yards in Chicago; that it does not agree with the Commission as to the facts in this case relative to who actually collected the extra 25 cents per car in question; (4) that it does not agree with the conclusion of the Commission that the practice adopted by respondents to exact the extra 25 cents per car from the shipper was unreasonable, because it, the court, is of the opinion that the extra 25 cents per car was justified by extraordinary conditions existing at that time and on account of the increased cost of labor and cost of service in general.

Furthermore, the question of whether the extra 25 cents per car was justified because of the conditions prevailing at that time could not be determined without also inquiring into the flat increases made to the line-haul carriers in their line-haul rates based on the extraordinary conditions then prevailing, and on the increased cost of labor and other items of transportation service. The record shows that the line-haul rates of the carriers, including the rates on live stock, which, in part, included the unloading charge, were, on account of the very conditions mentioned by the Circuit Court of Appeals in its opinion, increased three successive times, the first increase being 5 per cent, the second increase being 15 per cent, and the third increase being 25 per cent

of the then existing line-haul rates (See Original Ex. 7, pp. 861, 890, 891). It may be that the flat increases in the line-haul rates were sufficient, or more than sufficient, to compensate for an additional 25 cents per car in the unloading service. The situation, therefore, is similar to the situation presented to this court in *Interstate Commerce Commission* v. *Chicago, B. & Q. R. R. Co.*, 186 U. S. 320, and the same reasoning applies. However, the question of the reasonableness of the additional 25 cents per car was not involved, because before the reasonableness of an increased charge may become involved, the carrier must, in the manner required by paragraph 3 of Section 6 of the Interstate Commerce Act, amend its published tariffs to show such increase. If the line-haul carriers had amended their tariffs so as to show such increase, under requirements of the transportation act the burden to prove the reasonableness of the increase would have been upon the carriers.

Point VII.

The action of the Circuit Court of Appeals in affirming the judgment of the District Court has sanctioned the rule laid down by the District Court in the instant case and thus given it the effect of law and precedent. The decision of the Commission in the *Missouri Portland Cement Co.* case, 88 I. C. C. 492, was specifically based on the opinion of this court in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531. The rule laid down in the *Missouri Portland Cement Co.* case has become the established practice of the Commission. The decision of the District Court reported in 39 Fed. (2nd) 80 directly declares that established rule of the Commission to be unauthorized and invalid, and has raised anew doubt and dissension among the members of the Com-

mission on that subject. (*General Grinding Wheel Corporation* v. *Southern R. R. Co.*, 169 I. C. C. 83.)

A.

The provisions of the Interstate Commerce Act are strictly remedial for the benefit of shippers and the general public, and were enacted as a curb and protection against the carriers and should therefore be given a liberal construction in order that the true spirit and intent of the Act may be effectuated. In construing said Act much regard must be had for the needs of particular and efficient administration and a uniformity in procedure. The Interstate Commerce Commission is the body charged with the enforcement of the Interstate Commerce Act, which includes proceedings for reparation for unlawful or unreasonable charges, or for charges growing out of unlawful or unreasonable practices, and the finding of that body is, under the provisions of Section 16 of the Act, *prima facie* correct and sufficient to form the basis of an action in the courts based on a violation of the shippers' rights, and where there is sufficient evidence in the record before the Commission to sustain its order of reparation, and where the Commission has not acted arbitrarily or transcended its constitutional or statutory powers, the findings and orders of the Commission should be accepted by the courts as conclusive. (*Standard Oil Co.* v. *United States*, 283 U. S. 235.) Inasmuch as the Interstate Commerce Commission has for many years uniformly construed and interpreted the Act in such a way as to allow the consignee in the transportation transaction, and from whom the unlawful or unreasonable charge in question was exacted, to recover damages without reference to whether such consignee in the last analysis bore the unlawful charge and ultimately suffered pe-

cuniary loss, such construction and interpretation of the Act should, if not plainly erroneous, be treated as read into the statute. (*Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 428; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117; *New Haven R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361.)

There are particular reasons why the rule adopted by the Commission on this subject should be sustained by the courts:

1. Because if the right to recover reparation was confined to the persons who ultimately suffered pecuniary loss, a transgression of the law by a carrier would often go unpunished because of the impossibility in many cases of proving such ultimate pecuniary loss.

2. The exaction by the carrier of an unlawful or unreasonable charge becomes a tort at the instant of its exaction. (*Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531; *Louisville & N. R. R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217.)

3. It is elementary that a tort feasor charged with the commission of a tort cannot raise any question concerning reciprocal rights or equities as between the person against whom the tort was committed and third persons (*Winne* v. *Hammond*, 37 Ill. 99); "the general tendency of the law in regard to damages at least is not to go beyond the first step" (*Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531).

4. Inasmuch as, under the established law, the consignee to whom property is delivered, by accepting the delivery of the property, becomes primarily liable to the carriers for any undercharge in the amount of the carriage charges (*New York Central & Hudson River Ry. Co.* v. *York & Whitney*, 256 U. S. 406; *Doughty-McDonald Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 155

I. C. C. 47, 49; *Union Pacific Co.* v. *American Smelting & Refining Co.*, 202 Fed. 720), it logically follows that such consignee under like circumstances should be vested with the right to recover from the carrier the amount of any unlawful or unreasonable charge exacted from him by the carrier.

5. Regardless of the liberal provisions of the Interstate Commerce Act to enable the shippers and the public to relief against unreasonable or unlawful rates or practices of common carriers, it has always been the law that in a case involving the shipment of property over the lines of a common carrier, either the owner of the property or consignor, or the consignee named in the shipment, have sufficient interest in the subject matter to maintain a suit against the carrier on account of the commission of any tort by the carrier with reference to the transportation transaction. (*Edgerton* v. *Chicago, R. I. & P. Ry. Co.*, 240 Ill. 311; *Finn* v. *Western R. R. Co.*, 112 Mass. 524; *Hooper* v. *Chicago & North Western Ry. Co.*, 27 Wis. 81; *Southern Express Co.* v. *Kraft*, 49 Miss. 480.)

B.

The right of petitioners to maintain this suit in the District Court may also be sustained on the ground that in this case the record before the Commission conclusively shows that the petitioners herein prosecuted said claims for reparation before the Commission by reason of express authority from the shippers whom they severally represented in said claims for reparation before the Interstate Commerce Commission for the use and benefit of said shippers, and that petitioners therefore had the right to maintain the suit in the District Court as representatives of, and for the use and benefit of, the several shippers whom they severally represented before said

Commission. When all of the various orders and reports of the Commission entered and filed in the progress of the proceedings in the instant case before the Commission are read together, they show beyond question that the petitioners in this case sought reparation and obtained the same for the shippers in their representative capacities for the use and benefit of the shippers whom they respectively represented in the matter of the presentation and allowance of said claims. Their right as factors and agents to maintain said proceedings for reparation before the Commission for and on behalf of the shippers whom they severally represented, is sustained by the following authorities: Sections 13, 14 and 16 of the Transportation Act; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117; *Phillips Co.* v. *Grand Trunk R. R. Co.*, 236 U. S. 662; *Arcadia Mills* v. *Carolina, C. & O. Ry.*, 293 Fed. 639; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, at page 39.

Such right is also recognized and applied by the Interstate Commerce Commission in hundreds of cases, among such cases being *Independent Refiners Ass'n* v. *Western N. Y. & Pa. R. R. Co., et al.*, 6 I. C. C. 378; *Hercules Powder Co.* v. *New York Central R. R. Co., Director General as Agent, et al.*, 78 I. C. C. 55; *Memphis Freight Bureau* v. *St. L.-S. F. Ry. Co. and Director General*, 57 I. C. C. 212; *Detroit Coal Exchange* v. *Director General*, 80 I. C. C. 258; *Western Electric Co.* v. *Director General*, 87 I. C. C. 545; *Texas Live Stock Shippers' League* v. *Director General*, 139 I. C. C. 448; *Cattle Raisers' Ass'n of Texas and Chicago Live Stock Exchange* v. *C. B. & Q. R. R. Co.*, 10 I. C. C. 83; *Michigan Hardwood Mfrs. Ass'n* v. *Transcontinental Freight Bureau*, 27 I. C. C. 32; *Commercial Club of Omaha* v. *Anderson, et al. Ry. Co.*, 41 I. C. C. 480; *Tanners' Council of the U. S.* v. *Director General*, 78 I. C. C. 27.

The finding of the Commission in its report of June 2, 1925, (R. 147-151) as to the relationship between petitioners and the shippers whom they severally represented in the various transportation transactions involved, and the right of such petitioners to maintain said proceedings for reparation in their representative capacities and in their own names to recover the unlawful charges exacted from them as a result of said unlawful and unreasonable practice, should have been accepted by the District Court and by the United States Circuit Court of Appeals in this case. (*Western Chemical Co.* v. *United States*, 271 U. S. 268; *Virginia Railway Co.* v. *United States*, 272 U. S. 568; *United States* v. *Erie R. R. Co.*, 280 U. S. 103.)

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, and to such an end a writ of certiorari should be granted in order that this Honorable Court may review the decision of the Circuit Court of Appeals for the Seventh Circuit and after such review reverse it.

Franklin J. Stransky,
Clair R. Hillyer,
James P. Carey, Jr.,
Counsel for Petitioners.

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DEC 21

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, CO-PARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,
Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CERTIFIED EXCERPTS FROM ORIGINAL EXHIBITS WHICH ORIGINAL EXHIBITS ARE TRANSMITTED TO THIS COURT PURSUANT TO ORDER OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Counsel for Respondents.

BLAKELY-WARREN PRINTING COMPANY, CHICAGO.

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EXCERPTS FROM ORIGINAL EXHIBIT No. 6, PAGES 10 TO 38, BOTH INCLUSIVE.

"Mr. Shaw: It seems to me possibly a very brief statement would enable us to appreciate the position which has been taken by the various gentlemen up to the present time very much more intelligently than by a haphazard discussion. With your permission I will make a brief statement.

Examiner Thurtell: I will be very glad to hear it.

Mr. Shaw: On behalf of the Union Stock Yard & Transit Company of Chicago. This corporation was organized in 1865 under a special charter of the State of Illinois, which gave it a right to conduct many different activities, with only two of which we are concerned this morning. These two were the activity of conducting a stock yards business and the other the activity of conducting a railroad connecting all the railroads entering Chicago with the stock yards plant.

The corporation proceeded to build its stock yards, construct its railroad and conduct both activities.

At the time of its creation, it was constructed primarily and only by the various railroads entering Chi-

"cago. The officers of the railroads entering into Chicago were the directors of the Transit Company.

In the year 1867 the officers of the railroads, who were acting in their capacity as directors of the Stock Yards Company imposed a charge upon the railroads entering Chicago of 25 cents a car for unloading live stock and 50 cents a car for loading live stock at the stock yards plant, and the railroads paid that charge from that time down to this.

In the meanwhile, as the years went on, the Stock Yards Company divorced itself of its railroad and the railroad which it formerly owned and operated is now under a lease in perpetuity to a railroad corporation under the laws of the State of Illinois, known as the Chicago Junction Railroad Company, and the Stock Yards Company, so far as the two activities which I have previously outlined are concerned, only conducts one, to-wit, its stock yards business.

The physical method of bringing stock from any point in the United States to the yards or in transporting it from the yards to any point in the United States is as follows:

Through trains of live stock are brought to the Union Stock Yards Company from points of consignment by the motive power and train crews of what we will call the line haul carriers, who deliver these cars of live stock at the stock yards plant to the chutes, which are there provided for the loading and unloading of live stock.

The engines which bring those cars in, set those cars opposite the unloading platform, switch around to the rear of the train, the stock yards employes unload the car and the same train crews which bring the trains in haul them out, in other words, the train crews of the line haul carriers, and the reverse is true of the employes of the stock yards.

"Now, while this charge has been carried, and the loading and unloading charge found its origin in the way that I have designated, as a matter of fact the service which the Stock Yards have performed and is now performing for the railroad entering Chicago consists of more than one service.

In the first place, the Stock Yards Company furnishes the terminal facilities for the loading and unloading of live stock, which otherwise the carriers would have to furnish themselves.

In the second place, the Stock Yards actually do the work of loading and unloading, the physical manual work of sending the men into the yards and handling the cattle.

In the third place, the Stock Yards acts as the collecting agent of all of the carriers who consign freight to the stock yards district; their way-bills and collection bills are presented to the Stock Yards, who collect them.

And in the fourth place, the Stock Yards not only acts as the agents for collection but they insure the collection to the carriers; they guarantee that the carriers will sustain no loss in delivering the freight without the production of bills of lading.

For the purposes of this presentation, without going into the reasons why we did it, because it may not become material, and if it does I will be glad to state it—in the year 1912, I think it was, the Stock Yards Company, which had never previously covered the charges which it made in any tariff of any kind or character whatsoever, filed a tariff at Washington, showing this charge which it made for this service, calling it an unloading tariff, but not showing the other services which were connected with it.

The carriers, which had always previously absorbed

"these charges, as I have told you, without any tariff of any kind or character, immediately put in their tariffs an absorption charge of these charges.

A few years, or may be it was a year and a half ago, the Stock Yards Company decided that the services which it was rendering was being rendered at far below cost and thereupon it increased its charges from 25 cents for unloading to 50 cents and from 50 cents for loading to 75 cents, and filed a tariff at Washington to that effect, which became effective and is now in full force and effect without any objection, and up to the present time its reasonableness has never been assailed.

The carriers, however, did not absorb the increased charges in their tariffs and it left a hiatus between our charges for what we were doing and their absorption charges.

From examining into the question I came to the conclusion that my client, possibly including myself, had blundered originally and ought never to have filed the tariff. It was an operating charge pure and simple; ought always to have been an operating charge and the more I reflected on the matter the more I have become convinced that that is true. The reasons why are not necessary to give now.

So we decided to cancel out these charges and to put the matter where it should always have remained and where it did remain for forty or fifty years, to-wit, as an operating charge.

Therefore we served a notice at Washington that we would cancel out all of our charges and in the future such services and facilities that we performed and rendered would be covered by operating agreements with the people for whom we performed them and for whom we did them.

The railroads did not object to the cancellation. The

"railroads, however, took the position that if the tariffs were cancelled altogether their absorption charges should be cancelled altogether, and they visited Washington for the purpose of getting leave to cancel their absorption charges on the day when our cancellation tariffs became effective.

Some of the shippers, particularly Swift & Company, objected not to our tariff becoming effective, but to the cancelling out of the railroads' tariffs, and as the result of a general meeting we had there in Washington they finally objected to our tariffs becoming cancelled, in order to maintain the status quo until the entire question as to who should or should not pay for these unloading services done by the stock yards had been decided by the Commission. Therefore, this proceeding here.

Now, the meaning of the statements which have been made by these various gentlemen around the table, as I gather it to be, and I will ask them whether I am correct or not, and then we will get the record absolutely straight,—Judge Cowan says so far as his clients are concerned with respect to I. & S. 1118, he has no objection to the cancellation notice now becoming effective.

Swift & Company say that so far as they are concerned with respect to I. & S. same number, they have no objection to the cancellation tariff of the Union Stock Yard & Transit Company now becoming effective.

The Chicago Live Stock Exchange states the same position.

In view of those facts, so far as I am personally concerned, I have no interest in this proceeding at all, except to get that tariff of mine effective and put it on an operating basis. The railroads never have objected thereto, as far as I can see, that it should not be done, and in that case it should disappear off the docket. Thank you.

"Mr. Norton: I would like to say one word here. It appears that the suspension was caused by the Commission itself. That being true—

Mr. Shaw: I beg your pardon.

Mr. Norton: The suspension was caused by the Commission itself.

Mr. Shaw: Not at all. You are mistaken. You were not there.

Mr. Norton: I understood from Mr. Cowan that he did not raise any objection.

Mr. Shaw: I told you just how it happened. Did not I state it correctly?

Mr. Rynder: You and I and Mr. Heinemann were there.

Mr. Norton: In accepting that statement then, that the suspension was made during a protest, as Mr. Shaw now puts it, it becomes involved in this case, and the question has been raised by our answer, as to whether the absorption relates to the rate or to a transportation matter, and that is the question which is in issue in the case and cannot be avoided by the dismissing of the suspension case.

We therefore protest against any action of the Commission toward dismissing the suspension and insist upon the two being heard together.

Examiner Thurtell: Now, am I right about this; there are just these issues before the Commission—

Mr. Shaw: That is just the I. & S. case.

Examiner Thurtell: Well, take the two cases as they stand together, what ought these loading and unloading charges to be?

Mr. Shaw: Pardon me, that is not in the case.

Mr. Norton: That is in the case as far as the carriers are concerned.

Mr. Shaw: As far as I know they have never said anything to attack the reasonableness of our charges.

"Examiner Thurtell: How about 9977?

Mr. Shaw: That question is, who should do it, but the one concerning the reasonableness of our charges is not involved in this controversy.

Mr. Norton: It is involved, by the fact that the carriers refuse to concur.

Mr. Shaw: We might just as well fight this out right now. The question is not at all as to whether our charges which we are now making and which are now in force are reasonable. The question is whether they have got to pay for them or whether the shippers have got to pay for them.

Mr. Norton: Or the question whether anybody will pay.

Mr. Rynder: I would like to add that the tariff which was suspended did not increase any charges. Mr. Shaw: Not at all.

Mr. Rynder: I did not concede it—

Examiner: Thurtell: No, I am talking about the complaint. The complaint attacks these charges. Mr. Shaw: Beg pardon?

Examiner Thurtell: The complaint attacks those charges.

Mr. Shaw: No, sir, not the reasonableness of the charges. Mr. Barnes will tell you so. Mr. Barnes: No, sir.

Mr. Shaw: It will speak for itself.

Mr. Barnes: I will make a statement of the case, Mr. Examiner.

Mr. Burgess: Their charges increased since January 1, 1910, and are included in the issues of this case surely.

Mr. Shaw: Since what? Mr. Burgess: January 1, 1910.

Mr. Shaw: It only happened a year ago.

"Mr. Burgess: I say they have been increased since January 1, 1910, and they are involved in the issues of this case. The Commission has held that the burden is on you to justify them.

Mr. Shaw: Now, the Commission is not assailing our tariff at all, the reasonableness of it. Our tariff is in effect. It is not assailed by the complaint and there has been no question—it is for the first time now suggested—that the reasonableness of the charge is now involved at all. The sole question is who shall pay for it, the railroad or the shipper.

Examiner Thurtell: How about 9977?

Mr. Shaw: 9977 raises the question who should pay it, the carrier or the shipper.

Examiner Thurtell: Here is the outline of the complaint.

> 'It is alleged that effective May 21, 1917, defendant Union Stock Yards & Transit Company increased its charges for loading and unloading live stock at the Union Stock Yards, Chicago, as follows: For loading, from 50 cents to 75 cents per car; for unloading, from 25 to 50 cents per car; that for many years the other defendant carriers have absorbed in their entirety the charges of defendant Union Stock Yards & Transit Company, but have made no provision for the absorption of the increases in said charges as aforesaid; that certain of defendants are collecting from shippers the amount of said increase in terminal charges and that the exaction of said charges constitute an increase in all the through rates on live stock to and from Chicago; that defendants absorb out of their through transportation rates all loading and unloading charges in connection with live stock shipments at all the other markets in the United States; and that by reason of the facts alleged complainant's members and patrons are subjected to the payment of rates and charges for transportation that are unreasonable, unjustly discriminatory, and unduly preferential, in violation of sections 1, 2, and 3 of the Act.

'The Commission is asked to prescribe just and reasonable rates, rules and regulations for the future. Reparation is requested.'

Mr. Shaw: Let Mr. Barnes state his own conclusions. He represents the complainant.

Mr. Barnes: Now, if the Examiner please, the facts in this care are stated by the plaintiff to be as follows:

That on December 1, 1913, the Union Stock Yard and Transit Company of Chicago cancelled the lease previously entered into on December 15, 1897, and existing between it and the Chicago Junction Railway, and entered into a new agreement with the Junction Company, under and by virtue whereof the Stock Yard Company divested itself, in perpetuity, of all property of every kind and character whatsoever, which had been covered by said prior lease, but retained for itself the loading and unloading platform and facilities used in connection with its stock yards business;

That the Stock Yards Company now owns and for many years has owned extensive yards and other facilities for the unloading, loading, storing and marketing of cattle in the City of Chicago, and that these yards have become by the action of the Stock Yard Company and the various railroad companies centering at Chicago, including the defendants, the general depot for the unloading and loading of live stock at Chicago, and that the defendants hold out to the public the said Union Stock Yards as their live stock depot in that city, and in one way and another their lines of railway connect either directly or indirectly with the platforms of the Stock Yard Company of Chicago, where said cattle are loaded and unloaded, and that they have for a long time been accustomed to and do still transport carloads of live stock to the Union Stock Yards; that the defendant carriers handling live stock to or from Chicago, Illinois,

"have for more than half a century considered the Stock Yards of the Stock Yard Company of Chicago as their terminal for the receipt and delivery of substantially all carload shipments of live stock handled to and from the City of Chicago; that the live stock hauled to and from the Union Stock Yards of Chicago by the carriers making the line haul has for more than half a century been loaded and unloaded for the carriers by the Stock Yard Company of Chicago, or its employees; that the said carriers have for more than half a century paid the said Stock Yard Company of Chicago, or its employees, for the use of their loading station, terminals and platforms and the services rendered by them in loading and unloading the said live stock, and for their services in acting as the collecting agents of the carriers named herein, and in collecting the freight charges due to the carriers named herein from members of the petitioner, who do business as consignees and dealers in live stock in and about the said Stock Yards;

That the reasons for the employment by the defendants of the live stock facilities of the Stock Yard Company are the total lack of or inadequacy of individual live stock depots and terminal facilities of the defendant carriers.

Mr. Norton: What was that?

Mr. Barnes: That the reasons for the employment by the defendants of the live stock facilities of the Stock Yard Company are the total lack of or inadequacy of individual live stock depots and terminal facilities of the defendant carriers.

Mr. Norton: The Supreme Court found in the other case you would not use them.

Mr. Barnes: I think we can prove, Mr. Norton, that your facilities are nil.

Mr. Norton: They ought to be nil. No reason for

"them. The Supreme Court so held; you would not use them if we had them. Furthermore, they are not nil.

Mr. Barnes: That is a matter for discussion.

Mr. Shaw: You would have to look for them with a magnifying glass.

Mr. Barnes: That in the performance of the services of loading and unloading live stock the Stock Yard Company acts strictly as the agent or servant of the line-haul carriers and has never performed any services for the shipper or consignee, nor has it ever looked to either shipper or consignee for its compensation for the performance of such services.

Mr. Norton: That raises the question, and we want the Commission to pass on it.

Mr. Barnes: That is my statement of my case.

That for many years the tariffs of the Stock Yard Company, which were duly published and filed with the Interstate Commerce Commission, contained the schedule of charges made by that company for the service of loading and unloading live stock at the Union Stock Yards, Chicago, which were as follows:

For loading—50 cents per car of any capacity;

For unloading—25 cents per car of any capacity; that the aforesaid loading and unloading charges were last named and published in the Stock Yard Company's tariff U. S. Y. & T. Co., No. 2, I. C. C. No. 2, effective June 30, 19, and which tariff of rates continued in effect until M 1917, when the said terminal charges were increased to the following amounts, as per Stock Yard Company's Tariff U. S. Y. & T. Co., No. 2, I. C. C. No. 2:

For loading—75 cents per car of any capacity;

For unloading—50 cents per car of any capacity; that the aforesaid tariff having been incorrectly designated with respect to the proper reference numbers, an-

"other tariff was issued by said company on April 30, 1917, and effective June 21, 1917, known and designated as U. S. Y. & T. Co., Tariff No. 3, I. C. C. No. 6, which in form and substance read as follows:

Examiner Thurtell: Right there, this tariff that went into effect on June 21, 1917, increasing the loading and unloading charges, I understand that the railroad did not at the same time publish new absorptions respecting them.

Mr. Barnes: No, I will come to that in a moment.

Examiner Thurtell: I want you to tell us what the practice has been, who has been paying these loading and unloading charges.

Mr. Barnes: I will come to that. Examiner Thurtell: All right.

Mr. Barnes: I will come to the whole matter. Here is the way this tariff read:

> 'The charge made by this Company for the service (as a carrier's agent) of loading and unloading Live Stock at the Union Stock Yards, of Chicago, Ill., is as follows:
>
> For loading—75 cents per car of any capacity;
> For unloading—50 cents per car of any capacity.'

That thereafter the said Union Stock Yard and Transit Company of Chicago filed its supplement to said last-mentioned tariff, in and by which it proposed to withdraw and cancel said last-mentioned tariff, which said cancellation and withdrawal, would the terms thereof, have become effective on September 1, 1917, and which said proposed cancellation notice is in words and figures following:

> 'Effective September 1, 1917, U. S. Y. & T. Co. Tariff No. 3 I. C. C. No. 6, will be withdrawn and cancelled. The loading and unloading platforms of the Union Stock Yard & Transit Company of Chicago will in future be used or available for use by the railways entering Chicago, and using them as terminal stations, under operating arrangements.'

"That in compliance with Investigation and Suspension Docket No. 1118 of the Interstate Commerce Commission of August 24, 1917, the effective date of Supplement No. 1, U. S. Y. & T. C. Tariff No. 3, I. C. C. No. 6, cancelling the said tariff, was postponed by action of the Interstate Commerce Commission until December 30, 1917, and the said tariff ordered to remain in effect during said period of suspension, and later, to-wit, at hearings held before Examiner Markley, at Chicago, on November 8, 1917, and November 19, 1917, a further extension by suspension agreement to, by and between all interested parties.

That simultaneously with the filing of said notice of cancellation, said Stock Yard Company of Chicago notified each of the common carriers entering the City of Chicago, the defendant carriers herein, that the Directors had determined to cancel and have cancelled their tariff heretofore filed with the Interstate Commerce Commission, and have determined to make a rental charge for the terminal facilities furnished to and used by the lines carrying live stock to and from the Chicago market and to place their said facilities upon an operating basis;

That the tariffs published by the defendant carriers or their duly authorized agents and naming rates for the transportation of live stock (of various kinds the subject matter of this complaint) to and from the Union Stock Yards, Chicago, Illinois, are generally governed, so far as the Chicago Terminal charges are concerned, by L. A. Lowrey, Agent's Tariff, No. 20-J, I. C. C. No. 37, and supplements thereto and reissues thereof, and were so governed prior to this complaint by cancelled issues of said Lowrey's Tariff.

That all of the defendants other than the Stock Yard Company are parties to or concur in L. A. Lowrey,

"Agent's Tariff, No. 20-J, I. C. C. No. 37, which, on page 72 thereof, provides the basis for rates to and from facilities of the Chicago Junction Railway and for the absorption of the loading, unloading and weighing charges of the Stock Yard Company, by stating that the carriers shown (all of whom are defendants herein) will pay the Stock Yard Company's charges, as follows:

Loading charge, 50 cents per car;

Unloading charge, 25 cents per car;

That for many years the amount of the terminal charges absorbed by the defendant carriers herein exactly corresponded with the amounts charged by the Stock Yard Company, but that on May 21, 1917, when the said Company's Tariff No. 2, I. C. C. No. 2, became effective, which increased the loading and unloading charges from 25 cents and 50 cents per car, respectively, to 50 cents and 75 cents per car, no corresponding change was made in the aforesaid L. A. Lowrey, Agent's Tariff No. 20-J, I. C. C. No. 37, authorizing the absorption of the said increased charges. That although the said tariff of the Stock Yard Company carrying said increased charges provided that the charge was made for the service as the agent of the carrier, yet certain of the defendant carriers collected from the consignors and consignees shipping from and to said Union Stock Yards, Chicago, the additional 25 cents per car, which amount was and is being paid under protest pending the determination of the propriety thereof; which additional amount of twenty-five cents per car constitutes an increase in all of the rates on live stock to and from the City of Chicago, to the damage of the petitioners.

Mr. Dickinson: You say the carriers collected that?

Mr. Barnes: They assessed it and collected it through their agent, the Stock Yard Company.

"Mr. Dickinson: And they never saw their money afterwards?

Mr. Barnes: That is a matter for you to work out through your agent.

Mr. Shaw: Some of them did and some of them did not. It depends on the way they did it.

Mr. Barnes: It is there for you. It is waiting for you.

Mr. Dickinson: We have not found the man who had it and was willing to give it to us.

Mr. Barnes: Here is Mr. Shaw: Mr. Dickinson: He won't give it up.

Mr. Barnes: That the transportation of live stock does not terminate until after the stock has been unloaded by the carrier into suitable pens; that the duty to unload live stock into suitable pens includes the duty of the carrier to provide such facilities and the means of reaching them, or else to hire those owned by others; that this is the rule of the common law and also provided for by Section 1 of the Act to Regulate Commerce, wherein the term "transportation" is defined to include all services in connection with the receipt, delivery and handling of property transported.

That it being the duty of the defendant common carrier to provide and maintain all adequate and necessary terminal facilities for the receipt and delivery of live stock in the City of Chicago and to perform the loading and unloading services without additional charge, the plaintiff is not interested in the amounts paid by it to the agency hired by it to perform such services or in the amounts charged it by its agent for the performance of such services, excepting in so far as the carrier maintains a tariff arrangement which forces the consignee to bear a portion of such terminal cost, as it does so operate in this case;

"That regardless of whether or not the Union Stock Yard and Transit Company is permitted by the Commission to cancel its tariffs covering these terminal services, and regardless of the carrier's legal duty to perform or accord these terminal services as a part of the transportation without additional charge, the charges for these terminal services performed by the Stock Yard Company are now absorbed and have for years been absorbed by the line-haul carriers. By virtue of the said L. A. Lowrey, Agent's Tariff, on file with the Commission, the amount of absorption is limited to fifty cents (50c) per car for loading and twenty-five cents (25c) per car for unloading; that the rule in the absorption tariff results in the carrier only performing its legal obligation *pro tanto,* resulting in the remaining 25 cents per car being charged against the consignee;

That is the application of that Lowrey Tariff as it stands now. It says in specific terms that they will absorb but 50 and 25 cents of the Stock Yard Company charge. That result in the carrier only performing its legal duty in loading and unloading to that extent, not 100 per cent of its legal duty, but simply 25 and 50 cents worth of its legal duty.

Mr. Dickinson: It is not its legal duty to load and unload.

Mr. Barnes: That is a matter for judicial determination.

In other words, although the defendant carriers hire the Stock Yard Company to perform these terminal services for them, in obedience to their legal obligation to so accord such services to the shipper, yet by reason of the peculiar construction of the Lowrey Tariff the shipping public is not guaranteed to the full enjoyment of those services without the payment of additional charge;

"That such increased charge of 25 cents per car is unjust and unreasonable and unjustly discriminatory and unduly preferential and prejudicial, to the damage of the shippers and consignees.

That is the plaintiff's case.

Mr. Burgess: May I make this statement, Mr. Examiner, in reference to the statement that has already been made about the 25 cent increased charge not being in issue in this proceeding.

It is my understanding under Section 15 of the act to regulate commerce that when a rate has been increased since January 1, 1910, has been brought in issue, that the burden of proof is on the carrier which has increased the rate.

This rate is surely in issue in this case. It is the crux of the whole business, who shall pay for it, and it certainly is in issue.

The carrier which increased the rate by its published tariff with this Commission was the Union Stock Yard & Transit Company. True, on one of its issues it put on the face of it as carrier's agent, but it had no power of attorney from the other carriers to publish their tariff. It showed no concurrencies of other carriers in its tariff and it and it alone is the carrier that increased its charge and it is our position that on it and on it alone is the burden of proof as to the propriety of the increase.

Mr. Cowan: If they want to withdraw it, what objection have you to it?

Mr. Norton: We have this objection.

Mr. Cowan: I would like to hear it.

Mr. Nortion: In paragraph 12 of the complaint which was filed, the complainant, which is an association of brokers, handlers, of live stock on commission at the

"yards,—that is correct, is it not? Mr. Shaw: That is correct.

Mr. Norton: That association of brokers say: 'The defendant carriers are absorbing all loading and unloading charges for all of the cattle and live stock markets of the United States out of their transportation rates.'

That is not true. We have denied that. Probably we shall show in getting up the data that 90 per cent of our live stock is loaded and unloaded by shippers in various parts of the country; that at a few of these centers like Chicago and Kansas City a preference is shown by absorptions which have heretofore been made and which we now seek in this case to be rid of.

Mr. Barnes: That is 90 per cent of the local market?

Mr. Norton: The 90 per cent is the loading and unloading of live stock for any purposes and for all places throughout the United States.

But in these markets where the large concerns are operating the carriers have in the past and are now absorbing in Chicago 25 cents for loading and unloading for the performance of a service which the carrier is not required to perform.

It should not load and unload live stock any more than grain or any other carload commodity, and it does not do so except in centers like Chicago.

Now, these dealers out here at the yard seemed to be worried about this status of the Stock Yard Company, with which they ought to have no concern, so far as I can see.

This is what they say: 'That the action of the defendant carriers in adding to their transportation rates the additional charge of 25 cents per car for the loading and unloading service on live stock to and from the Chicago Live Stock Market, located at the Union

'Stock Yards, Chicago, Illinois, while absorbing such charges at all competing markets'—, there you see the issue is raised, which cannot be avoided under the act, the issue of discrimination—'while absorbing such charges at all competing markets, results in an unjust discrimination against complainant's members and patrons and gives to competing markets an undue and unreasonable preference and advantage over the Chicago market which results in much business that was heretofore handled through the Chicago market being diverted to competing markets that are free from such harmful practices of the defendants.

'Paragraph 13. That by reason of the facts stated in the foregoing petition complainant's members and patrons are subjected to the payment of rates and charges for the Interstate transportation aforesaid that are unjust and unreasonable.'

Now, I do not know whether counsel for the complainant answered your question or not, but the fact at the present time is that the additional charge is being paid by the shippers so far as the rate is concerned, so that the shipping public have now placed upon them an additional charge and nobody can pass upon that but the Interstate Commerce Commission.

Mr. Barnes: Mr. Nortion, we are not contending for the unreasonableness of this charge *per se.*

Mr. Dickinson: You say so in your complaint.

Mr. Barnes: No.

Mr. Thorne: Section 13 specifically says so.

Mr. Norton: The complaint goes on further to say: '—In violation of Section 1, unjustly discriminatory in violation of Section 2 and unduly preferential and prejudicial in violation of Section 3 of the act to regulate commerce aforesaid and results in their direct damage and injury.'

There was another section I wanted to call your at-

"tention to. I thought I had it picked out. But it sets up the proposition, these commission men out there set up the proposition, which is none of their concern, that this is a transportation matter for private agreement between the carriers and the Stock Yard Company, with which the Interstate Commerce Commission has nothing to do as a rate proposition. Why should they set that up in this complaint?

Mr. Cowan: I do not see what objection you have to the Stock Yard Company withdrawing their charges as to the shippers.

Mr. Norton: I want a finding by the Commission that the absorption of any charge at Chicago on carload freight is prejudicial and discriminatory as against the loading and unloading of carload freight in other parts of the country and especially the loading and unloading of carload live stock."

EXCERPTS FROM TESTIMONY OF C. A. HENKLE, GENERAL MANAGER, UNION STOCK YARDS & TRANSIT COMPANY, ORIGINAL EXHIBIT NO. 6, PAGES 316 TO 341, BOTH INCLUSIVE.

"Mr. Barnes: Does the Stock Yard Company act as a collection agent for the delivering carriers in collecting the freight charges from the consignees on the live stock handled at the Union Stock Yards?

Mr. Henkle: Yes, sir.

Mr. Barnes: Will you kindly explain briefly the method that is employed with reference to the collection of those freight charges?

Mr. Henkle: Shall I at the same time state the other duties we are carrying on?

"Mr. Barnes: What method do you use for the purpose of collecting these freight charges and other charges from the consignees located at the stock yards?

Mr. Henkle: The bills are delivered by the conductors of the trains to our receiving office.

Mr. Barnes: The way-bills your refer to?

Mr. Henkle: The way-bills and then forwarded to the—I can cover that with some other points by reading this statement. Mr. Barnes: All right.

Mr. Henkle: The trunk line or railway carrier in completing its haul to billed destination, such billed destination being a commission firm located within the confines of the Union Stock Yards District, hauls the train of live stock to the chutes of this company with its own power and its own train crew.

When trains are set at the unloading chutes, the conductor in charge of the respective trains take the way-bills and the attached live stock stubs and passes them through a window to a clerk in the division office, who in turn hands them to an employee of said office, in the order in which received, who calls the car number, contents, and consignee from the pulpit to the waiting commission men's employees, thus giving notice of the arrival of the stock to such commission men's employees as are present at this calling.

The stubs are then turned back into the division office, where record is made in the Yard Book, which is the official record of the receipt of the respective cars contained in any one train. At the same time a bulletin is written, showing the consignor, consignee, car number and contents of the car by classes of animals (Cattle, horses, hogs, or sheep), which bulletin is posted in the assembly room of the division office for the information of such commission men's representatives who were not present at the reading of the way-bills from the pulpit.

"Meanwhile the cars are being unloaded by Stock Yards employees across the platforms and into the receiving chutes of the U. S. Y. & T. Co., and record is then taken of each car, designating the chute into which the stock is unloaded.

Subsequent to placing the stock in the chute pens an actual count of the contents of each car is made, and notations made as to the dead, cripples, class of animals (cattle, hogs, sheep, horses) and the number of live animals unloaded from any given car.

The animals are subsequenutly delivered to the commission men direct from the chute pens, or are yarded by the U. S. Y. & T. Company into locations provided by said company for the use of the various commission firms.

To revert to the handling of the way-bills. After the permanent record is made, these way-bills and live stock stubs are delivered by messenger to the respective railroad company's local representative, who in turn forwards them to the Western Weighing Association Bureau for the purpose of securing the actual weight of the contents, which is obtained by the Western Weighing Association from the commission merchant who sells the particular animal for consignor's account, the said Association transmitting the respective way-bills and stubs to such commission merchant.

Subsequent to this a list of the car number, number of animals contained in the car, and giving the condition, is sent to the Western Weighing Association for the purpose of their engrossing upon the stubs the animals contained in each car, to permit of the correct assessment of yardage charge in the accounting office.

After the information as to the correct weight is inserted on the live stock stubs by commission men, the stubs are again sent to the Western Weighing Associa-

"tion, and are in turn sent back to the railroad agent for final revision.

After the final revision is made, they are sent to the accounting office, where the debits and credits evidencing the amount due from the commission men and to the railroads are recorded.

Collections are made from commission men twice a week—Monday and Thursday.

We pay the railroads their freight charges once a week—every Monday morning.

Prior to the issuance of the U. S. Y. & T. Co. tariff raising our unloading charge from 25 cents to 50 cents, and our loading charge from 50 cents to 75 cents, it was our custom to collect from the carrier our established charge by monthly bill.

After the issuance of the U. S. Y & T. Company's tariff raising the charges, as aforesaid, this company was given to understand at various conferences and by direct advice from Local Agents that the carriers would refuse to pay in accordance with the said tariff.

Whereupon, to insure collection of our published tariff charges it was decided to withhold the amount due this company from the weekly settlements with the railroad carriers.

Mr. Shaw: Pardon me, but back there where you read, is that clerk in the division office an employee of the Stock Yard Company? Mr. Henkle: Yes.

Mr. Dickinson: Mr. Shaw, is any evidence going to be offered here to support the reasonableness of the increased charge?

Mr. Shaw: I do not know how the complainants are going to make out their case. I will answer that question the instant the petitioner gets through with his case.

"Mr. Barnes; I will make my statement to that effect as soon as I go to rest, Mr. Examiner.

Mr. Dickinson: Are officers of the Union Stock Yard & Transit Company—

Mr. Shaw: If you want me to explain—are you through with this witness, Mr. Barnes? Mr. Barnes: Yes.

Mr. Shaw: Then let me examine him a minute.

Mr. Barnes: No, I am not, Mr. Shaw; I intended to resume after he got through.

Mr. Henkle, is this two dollars switching charge also added to the carrier's transportation charges and collected from the consignee?

Mr. Henkle: The two dollar terminal charge is. Mr. Barnes: Yes.

Mr. Henkle: Yes, sir.

Mr. Barnes: And in addition to that your loading and unloading charges? Mr. Henkle: Yes, sir.

Mr. Barnes: What loading and unloading charge is added now?

Mr. Henkle: Just a moment on that last question. Please put the question again.

Mr. Barnes: Are you adding any charge to the carrier's freight bill for loading and unloading service? Mr. Henkle: No, sir.

Mr. Barnes: None whatever.

Mr. Henkle: We do not. We collect the bills as delivered to us by the railroads and as made out by them.

Mr. Barnes: Are you collecting any charge from the consignee for the service of loading and unloading at the present time?

Mr. Henkle: Most of the roads are showing an additional charge.

Mr. Barnes: On their freight bills?

"Mr. Henkle: On their freight bills. Mr. Chase can give you more definite information on that.

Mr. Dickinson: Is he going on the stand? Mr. Henkle: I believe so.

Mr. Barnes: Is Mr. Chase present? Mr. Shaw: He is in the room.

Mr. Dickinson: I just wanted to clear it up now, as long as you bring it up.

Mr. Shaw: I will clear that up, when I get to my examination.

Mr. Barnes: You say you cannot answer that question?

Mr. Henkle: I have answered the question, that we are collecting for most of the roads an additional 25 cents.

Mr. Barnes: That clears up the point.

Mr. Shaw: I will clear that up if you let me alone.

Mr. Dickinson: It is not a question of clearing it up. It is having him state the facts.

Mr. Barnes: Take the witness, Mr. Shaw.

Mr. Shaw: Mr. Henkle, when a live stock train is brought in under the crew of the line carrier and stationed at the unloading docks of the stock yard company the attached live stock stubs you say are passed through a window to a clerk in the division office? Mr. Henkle: Yes.

Mr. Shaw: The clerk in the division office is an employee of the Union Stock Yard & Transit Company of Chicago? Mr. Henkle: Yes.

Mr. Shaw: This clerk hands them to an employee of said office, that is, another employee of the Union Stock Yard & Transit Company of Chicago? Mr. Henkle: Yes.

Mr. Shaw: This second employee of the Union Stock

"Yard & Transit Company calls the car number, contents and consignee from the pulpit. What is the pulpit?

Mr. Henkle: It is very much like any other pulpit, a raised platform with a railing around it in the center of the receiving office, so that he is above the men that are standing on the floor in the assembly room of the receiving office.

Mr. Shaw: That is so the persons who are expecting consignments that morning can ascertain whether the particular train which is at that instance being unloaded contains their cattle or not? Mr. Henkle: Yes, sir.

Mr. Shaw: Announcements made in that way save the time of notices being sent to the officers of the various commission firms who do business at the stock yards? Mr. Henkle: Yes.

Mr. Shaw: How many of these commission firms are there that do business at the stock yards, in round numbers? Mr. Henkle: Perhaps 125.

Mr. Shaw: And how many other persons other than commission merchants are consignees of live stock arriving at the stock yards?

Mr. Henkle: Well, the great majority of stock arriving there is consigned to commission firms; but a very small percentage to others.

Mr. Shaw: 150 altogether consignees who are likely to expect stock out there in the mornings?

Mr. Henkle: Not more than that.

Mr. Shaw: So there are 150 consignees of stock who might expect to receive stock any morning at the stock yards? Mr. Henkle: Yes.

Mr. Shaw: It is to notify those people when these various trains come in that the calls are made by an employee of the Stock Yard Company?

Mr. Henkle: Yes.

Mr. Shaw: How many trains a day come to the stock

"yards on a busy day of live stock, cattle and hogs, altogether?

Mr. Henkle: We have had as high as 3 or 400 trains.

Mr. Shaw: Three or four hundred trains? Mr. Henkle: Yes.

Mr. Shaw: All unloaded in the same day?

Mr. Henkle: Loaded and unloaded in the same day.

Mr. Shaw: This stub which is handed to your division agent through a window, what is this stub?

Mr. Henkle: It is the way-bill that is carried by the conductor of the train.

Mr. Shaw: That is, the conductor of the train gives you his official document showing what his train has and transfers it to your possession? Mr. Henkle: Yes, sir.

Mr. Shaw: So that what contains the official contents of what the train had in it passes from the possession of the train conductor to the employee of the Stock Yard Company? Mr. Henkle: Yes.

Mr. Shaw: Now, you say that from this weigh bill or stub, as you call it, an entry is made in the yard book, which is the official record of the receipt of respective cars contained in any one train, that is, the yard books of the Union Stock Yard & Transit Company of Chicago? Mr. Henkle: Yes.

Mr. Shaw: Is that also kept as a record book for the railroads bringing the cars in there, subject to their inspection at any time?

Mr. Henkle: Subject to their inspection at any time.

Mr. Shaw: So they can see what cars came in on each train and were delivered to you simultaneously with the way-bill? Mr. Henkle: Yes.

Mr. Shaw: And see whether the yard book record conforms with the way-bill record?

Mr. Henkle: Yes. They could also refer to the car-

"bon copy of that book, which forms a bulletin and is hung in the assembly room.

Mr. Shaw: You say subsequent to the placing of the stock in the chute pens an actual count of the contents of each car is made and notations made as to the dead and crippled animals found? Mr. Henkle: Yes.

Mr. Shaw: Is that count made by the employees of the Stock Yards Company. Mr. Henkle: Yes.

Mr. Shaw: Do you know whether or not the railroads rely upon that for their settlement of claims for injured cattle, etc?

Mr. Henkle: They do. That is the official record. Mr. Shaw: For the railroad?

Mr. Henkle: That is the only record made.

Mr. Norton: The stock yards relies on it with respect to prices, too?

Mr. Shaw: We don't sell cattle. Mr. Henkle: We don't have any prices.

Mr. Norton: The commission merchants.

Mr. Shaw: Does the Stock Yard Company do anything with the dead or crippled animals? Mr. Henkle: No, sir.

Mr. Shaw: What becomes of the dead or crippled animals?

Mr. Henkle: The dead animals are removed by a rendering company and the crippled animals are looked after by the commission men representing the shippers.

Mr. Shaw: Who attends to sending for the rendering company to remove the dead animals?

Mr. Henkle: Those that are removed from the cars are on the platforms and the rendering company has their own employees who walk up and down these platforms.

"Mr. Shaw: Does the Stock Yard Company remove the dead animals from the cars? Mr. Henkle: Yes.

Mr. Shaw: You say after the record has been made in the permanent yard book of the cars and the car numbers, you forward them to the Western Weighing Association Bureau? Mr. Henkle: Yes.

Mr. Shaw: What is the Western Weighing Association Bureau?

Mr. Henkle: It is a bureau that I believe represents the railroads for the purpose of securing weights and checking the bills.

Mr. Shaw: Now, as a matter of fact, who weighs those cattle when they come into the yard?

Mr. Henkle: The Stock Yard Company.

Mr. Shaw: Do the railroads get their weights from the services rendered by the Stock Yard Company in weighing those cattle? Mr. Henkle: Yes, sir.

Mr. Dickinson: That is true of any freight. That is true of grain. The shipper weighs it.

Mr. Shaw: If we did not weigh it for you you would weigh it for yourself.

Mr. Burgess: Is that the only reason you have it weighed, so we may have the weights on it?

Mr. Shaw: I will answer that in just a second.

Mr. Norton: Don't ask such a hard question.

Mr. Shaw: Now, you say that the way-bills are sent to the Western Weighing Association, to have engrossed upon them the animals contained in each car to permit the correct assessment of yardage. Who takes the way-bills from the first division office to the weighing association, back to the commission men and back to the Weighing Association, the physical service of carriage of the way-bill?

Mr. Henkle: It is a stock yards employee.

Mr. Shaw: Now, after the correct information as to

"the weight is inserted by the Western Weighing Association, the way-bills are in turn sent back to the railroad agent for final revision. Who takes them to the railroad agent for final revision?

Mr. Henkle: I think a messenger of the Western Weighing Association makes that trip.

Mr. Shaw: Is all this service or work which you have heretofore described with respect to the arrival of trains or the handling of the way-bills paid for or supposed to be paid for out of the unloading charge or loading charge, as it is called, which the stock yard company receives and which is in question in this case?

Mr. Henkle: That is the only money we receive for it.

Mr. Shaw: These loading docks and chutes at which the cattle are unloaded belong to the stock yards company don't they? Mr. Henkle: Yes.

Mr. Shaw: Do you receive any compensation from the railroads for using these loading docks and platforms as their termini, except as it is included in the unloading charge which is at issue in this case? Mr. Henkle: No, sir.

Mr. Shaw: Some mention has been made here, Mr. Henkle, of the collection of freight charges. Are you familiar with the way that is done, or is it necessary to call Mr. Chase on that?

Mr. Henkle: It would probably be better to call Mr. Chase, because he handles the work directly.

Mr. Shaw: I wish you would describe very briefly what service, if any, the Stock Yard Company renders with respect to the loading of live stock, cattle and hogs, which are loaded out at the yards. What do the employees do with respect to that service?

Mr. Henkle: The employees of the Stock Yard Company collect the animals from the various parts of the

"yard and take them to the chutes and loading platforms and there load them out for the railroad companies.

Mr. Shaw: What, if anything, do the Stock Yard Company have to do with the preparation of the waybills or anything of that sort or the marking or carding of cars, if anything, for the railroads in connection with the outgoing shipments?

Mr. Henkle: I think we have nothing to do with that.

Mr. Shaw: Explain the movement of a train which is to be loaded out with an outbound shipment?

Mr. Henkle: The cars are set at what is known as our loading platforms and after the animals are collected and loaded the train is moved out either by the Chicago Junction or the line-haul carrier.

Mr. Shaw: Do you know what the arrangement of the Chicago Junction is, if it does that movement at all, with the line-haul carriers? Mr. Henkle: No, sir.

Mr. Shaw: When a load of cars come in with their own crew and power and while they are being unloaded what does the engine crew do with the engine of the train which is being unloaded?

Mr. Henkle: They usually run around the train and come up along to the other end, to be ready to pull out the empties as soon as the car is unloaded.

Mr. Shaw: And does the same engine which pulls the train in pull the empty train back? Mr. Henkle: Yes.

Mr. Shaw: After the process of unloading is completed? Mr. Henkle: Yes.

Examiner Thurtell: How long does it take you to unload a train?

Mr. Henkle: It usually takes two or three minutes to the car. If a train of thirty cars comes in we would expect to have it unloaded in about forty minutes.

Mr. Barnes: That is, provided there are no dead or crippled animals found in the cars.

"Mr. Shaw: Do you know, Mr. Henkle, that all cars to be loaded with outbound live stock are spotted by the line-haul carrier at the chute of the Stock Yard Company, or don't you know? Mr. Henkle: I don't know.

Mr. Shaw: That is all from this witness of my examination.

Mr. Barnes: One more question:

You have enumerated a number of services which the Stock Yard Company performs and for which the roads pay you a loading and unloading charge. Do you consider that any of those services are performed for the consignee at the stock yards? Mr. Henkle: No, sir.

Mr. Barnes: I will ask you if you load and unload and handle live stock at the Union Stock Yards for the following roads, which I will enumerate:

Atchison, Topeka & Santa Fe Railway Company.

Baltimore & Ohio Railway Company.

Baltimore & Ohio Chicago Terminal Railroad Company.

Chesapeake & Ohio Railway Company of Indiana.

Chicago & Alton Railroad Company.

Chicago & Eastern Illinois Railroad Company, and W. J. Jackson, receiver.

Chicago & Erie Railroad Company.

Chicago & Northwestern Railway Company.

Chicago, Burlington & Quincy Railroad Company.

Chicago Great Western Railroad Company.

Chicago, Indianapolis & Louisville Railway Company.

Chicago, Milwaukee & St. Paul Railway Company.

Chicago, Rock Island & Pacific Railway Company.

Chicago, Terre Haute & Southeastern Railway Company.

Grand Trunk Western Railway Company.

Illinois Central Railroad Company.

Indiana Harbor Belt Railroad Company.

"Michigan Central Railroad Company.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

New York Central Railroad Company.

New York, Chicago & St. Louis Railroad Company.

Pennsylvania Company.

Pere Marquette Railway Company.

Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company.

The Wabash Railway Company.

Do you perform those services for all of those lines, Mr. Henkle?

Mr. Henkle: Yes, sir.

Mr. Barnes: That is all.

Mr. Cowan: I have a question or two.

Mr. Henkle, it appears in your tariff, I. C. C. No. 6, Union Stock Yard & Transit Company tariff No. 3, effective June 21, 1917, tariff on live stock, over your signature as general manager it reads as follows:

> 'The charge made by this company for the service, as a carrier's agent, of loading and unloading live stock at the Union Stock Yards, of Chicago, Illinois, is as follows:
>
> For loading—75 cents per car of any capacity;
>
> For unloading—50 cents per car of any capacity.'

This does not state against whom the charge is made, but you use the term that it is made for the service as a carrier's agent. Is the charge collected as agent of the carrier or for the Stock Yard Company?

Mr. Henkle: What is that question?

Mr. Cowan: Is the charge made for the Stock Yard Company or is it made as an agent of the carrier?

Mr. Connell: What carrier?

Mr. Cowan: The carriers named in the circular, as a carrier's agent.

"Mr. Henkle: We make the charge against the carrier for the Stock Yard Company.

Mr. Dickinson: That was not the question. Mr. Shaw: That is an answer.

Mr. Dickinson: He wanted to know whether it was made for the benefit of the Stock Yard Company or the benefit of the carrier?

Mr. Cowan: I did not use the term "benefit". I will read the expression again: "The charge made by this company for the service (as a carrier's agent) of loading and unloading," and so forth. Is that charge made for the Stock Yard Company or for the carrier as the agent of the carrier?

Mr. Shaw: I submit he has answered the question.

Mr. Henkle: Does not my answer that the charges made against the carrier for the Stock Yards Company do?

Mr. Dickinson: I thought you said you made this charge against the shipper. Mr. Henkle: Against the shipper?

Mr. Dickinson: To the extent of 25 cents, you said you collected it from the shipper or consignee.

Mr. Henkle: We collected it through the commission men. Mr. Dickinson: He is the consignee, isn't he? Mr. Henkle: Yes.

Mr. Dickinson: And you keep it? Mr. Henkle: No.

Mr. Dickinson: After you collect it? Mr. Henkle: No.

Mr. Dickinson: What do you do with it? Mr. Henkle: Give it to you.

Mr. Dickinson: 25 cents a car? Mr. Henkle: Yes.

Mr. Burgess: We never have had it. That is the only trouble with it.

Mr. Cowan: Jones has paid it.

Mr. Henkle: You are going to get it.

"Mr. Burgess: I hope so.

Mr. Henkle: We don't want the 25 cents.

Mr. Dickinson: How long have you been making this collection?

Mr. Shaw: Wait a second. I want to object to that.

Mr. Dickinson: Are you through with him on your examination?

Mr. Shaw: Yes. But he was not interrogated about that point. We have the auditor here, who will indulge in persiflage with these gentlemen all afternoon.

Examiner Thurtell: No he won't. We are going to stop this persiflage pretty soon. There really is no occasion for this. It is perfectly plain what is done. That this fifty cents is collected as it stands now—you say you collect it as an agent for the railway company? Mr. Shaw: Exactly.

Examiner Thurtell: And that you turn it over to them, but you charge them fifty cents. They say you keep this fifty cents yourself. It does not make any difference whether you keep this fifty cents or some other fifty cents. You do keep fifty cents out of the charge, and that has been perfectly apparent for twenty-four hours.

Mr. Cowan: Do you make any charge against the shipper direct for the Stock Yards Company except in making the charge as a carrier's agent? Mr. Henkle: No, sir."

EXCERPTS FROM TESTIMONY OF H. W. BEYERS, ASSISTANT FREIGHT TRAFFIC MANAGER, CHICAGO & NORTH WESTERN RAILROAD, ORIGINAL EXHIBIT NO. 6, PAGES 472 TO 476; 496 TO 498; 504 TO 512; 535 TO 539; 542 TO 544, ALL INCLUSIVE.

Pages 472 to 476, both inclusive:

"Mr. Barnes: Mr. Beyers, with reference to the charges on cars of live stock that come into the Union Stock Yards, would you deem it a practical matter for your roads to undertake the collection of charges on all those cars?

Mr. Beyers: Yes, we could do it. I think we could.

Mr. Barnes: Have you had any experience with the collection of those charges?

Mr. Beyers: No, but not a great while ago, we were prepared to go ahead along those lines with other carriers, under an organization that we thought we could perfect and could handle the business to our entire satisfaction.

Mr. Barnes: Why didn't you go into the plan?

Mr. Beyers: We sort of ran into a white flag between your company and others.

Mr. Dickinson: You mean Mr. Shaw's Company.

Mr. Beyers: The Union Stock Yard & Transit Company.

Mr. Dickinson: This gentleman hasn't any company.

Mr. Beyers: Also the Chicago Live Stock Exchange.

Mr. Barnes: You mean you got together?

Mr. Beyers: We had the accountants meet and they

"decided amongst themselves, with the Union Stock Yard & Transit Company, upon a method to proceed, with a view of satisfying all interests under the tariffs, as they existed.

Mr. Barnés: Isn't it true that you did not proceed with your plan because you found out certain phases of the situation that made it wholly impractical?

Mr. Beyers: No, I do not so understand that. Perhaps I had better recite what caused us to think we had better make our own collections.

The Union Stock Yard & Transit Company originally withheld twenty-five cents a car of our money, and when they insisted the carrier must pay this advance, even though their tariff on file with the Interstate Commerce Commission seemed to indicate to the contrary or did indicate to the contrary, we decided to go ahead and make our own collections, and our auditors were so instructed.

Subsequently, a meeting was held with the various interests and the Union Stock Yard & Transit Company, and it was agreed that when we submitted our stubs indicating the total freight charges due us, we would add this twenty-five cents; that that would be satisfactory to the U. S. Y. & T. Co. and that, with the twenty-five cent absorption provided for, would make the fifty cents they were asking for their service.

Mr. Shaw: Who did you have that conference with? With the Union Stock Yard & Transit Company?

Mr. Beyers: Mr. Shaw, I think I have the record here; I am speaking now of a conference between the Chicago—

Mr. Shaw: I did not mean to interrupt you. I beg your pardon. I will ask the question later on, Mr. Beyers.

Mr. Beyers: The understanding was that we would

"show on our stubs "unloading charges as per U. S. Y. & T. Co. I. C. C. No. 2, 50 cents less absorption authorized in Lowrey's I. C. C. No. 26, 25 cents, leaving for collection 25 cents."

After we reached that understanding, we decided not to go ahead with the plan of making separate collections.

Mr. Dickinson: You mean of your freight charges?

Mr. Beyers: Of our freight charges, from the commission merchants. Now, from the packers, we make our collections direct.

Mr. Barnes: Mr. Beyers, you spoke of a proposal to cease the absorption of these charges. Do I understand in case that occurs you will reduce the terminal charge to that extent, here in Chicago?

Mr. Dickinson: Just read that question, please.

(Question read.)

Mr. Beyers: You are referring now to the terminal charge of two dollars? Mr. Barnes: Yes, sir.

Mr. Beyers: So far as the Chicago & Northwestern Railroad is concerned, we pay trackage of 75 cents per car each way, and there is $1.50 there. While I would not undertake to give you the exact figures in regard to the cost of our service, I am satisfied that our service at this time will exceed 50 cents per car, so even if we were relieved of the 25 cent charge, we are now paying the Union Stock Yard & Transit Company, I would say the two dollars per car terminal charge would not be excessive, even if we were that much ahead.

Mr. Widdicombe: That is not involved anyhow. I object to that question.

Mr. Kelly: I think the whole answer ought to be stricken out as not responsive. He did not come anywhere near answering the question.

Mr. Barnes: The question I asked Mr. Beyers was if

"you put into execution your plan to cease absorbing this terminal charge, this unloading charge, would you reduce the two dollars terminal to that extent?

Mr. Widdicombe: I object to that as being immaterial and not involved in the issues in this case.

Examiner Thurtell: He has answered the question.

Mr. Barnes: What was the answer?

Examiner Thurtell: So far as the attitude of the Northwestern is concerned, his attitude is he does not think they would do so, isn't that the purport of your answer?

Mr. Beyers: Yes, sir. Mr. Barnes: That is all."

Pages 496 to 498, Both Inclusive.

"Mr. Beyers: We got up to the point where we reached an understanding with your company, that made it possible for us to conserve our revenue and not have you withhold the 25 cents.

Mr. Shaw: Now, what was the understanding, as you call it?

Mr. Beyers: Well, the understanding was, as I explained it a little while ago, that we were to show on our bills that we handed to you, that the unloading charges as per U. S. Y. & T. Co. No. 2, were 50 cents.

Mr. Shaw: Now, isn't it a fact—

Mr. Norton: Let him answer it.

Mr. Shaw: I didn't mean to interrupt him, but let his own counsel take care of him.

Mr. Widdicombe: He can take care of himself, I think, if you will let him alone. Mr. Shaw: Go ahead.

Mr. Beyers: (Continuing) Less absorption, authorized in Lowrey's I. C. C. 26, 25 cents, leaving for collection 25 cents.

Mr. Shaw: You don't think that extra 25 cents ought to be charged against you? Mr. Beyers: Not against us, no.

"Mr. Shaw: And you know that we said to you that if we continued to collect those bills for you that we would take it out of you, whether you agreed to it or not.

Mr. Beyers: That we would take it out?

Mr. Shaw: That we would take out the 25 cents whether you plussed the bill or not. Mr. Beyers: Yes, that was in May.

Mr. Shaw: So that in May, 1917, you had the option of going down and collecting your own bills, in which event we could not take it out, could we? Mr. Beyers: No. sir.

Mr. Shaw: You didn't do it? Mr. Beyers: No, sir.

Mr. Shaw: On the contrary, rather than go to the trouble of collecting your bills, you preferred to plus your bills 25 cents and still give them to us for collection, did you not?

Mr. Beyers: Well, it was an amicable adjustment of differences that existed at that time.

Mr. Shaw: That is what you did. Mr. Beyers: Yes, sir."

Pages 504 to 512, Both Inclusive.

"Mr. Beyers: We have always understood that the trackage charge included the use of the facilities of the Chicago Junction Railway, as a delivering terminal carrier.

Mr. Shaw: Did you ever have any agreement of that character in writing?

Mr. Beyers: I could not answer that.

Mr. Shaw: Now, as a matter of fact, the Stock Yards Company did the unloading under a separate charge, payable by your company to that company, ever since you have known anything about it, hasn't it? Mr. Beyers: Yes.

Mr. Shaw: And you have paid a different charge to

"the owner of the rails, ever since you have known anything about it, haven't you?

Mr. Beyers: Well, we considered the two as one company.

Mr. Shaw: I don't care how you considered them; you paid it as a fact.

Mr. Beyers: Yes, sir, as one company we were dealing with.

Mr. Shaw: And if there were two companies,—I will change that; eliminating the possibilty that they were one and the same, which they are not, but eliminating that possibility, you do not consider it the duty of a carrier from whom you rent trackage rights to notify your consignees of the arrival of your freight do you?

Mr. Beyers: Well, now—

Mr. Shaw: You can answer that yes or no. Mr. Beyers: At what point?

Mr. Shaw: Any point in the United States.

Mr. Beyers: Well, at some points yes and some no.

Mr. Shaw: Well, where is the point yes? Mr. Beyers: At the Union Stock Yards.

Mr. Shaw: And any other place in the United States that you know of?

Mr. Beyers: It would depend on the trackage—

Mr. Shaw: Any other place in the United States that you know of?

Mr. Dickinson: He is getting pretty close to bulldozing the witness.

Mr. Shaw: It is a pretty palpable proposition that his answer is evasive.

Mr. Dickinson: Don't bull-doze the witness.

Mr. Shaw: Now, Mr. Beyers, I was asking you if you knew of any other place in the United States other than the Stock Yards where the Northwestern Railroad Company used the tracks of another company under a track-

"age arrangement, where the other company was expected to notify the consignee of the freight arriving in the Northwestern trains under Northwestern power?

Mr. Beyers: I think in the case of the Illinois & Northern, where we go over their rails under a trackage arrangement, that is the situation; we take a car and place it on the rails of the Illinois & Northern Railroad and that would end it; it would be the duty of the Illinois & Northern—

Mr. Shaw: I am not talking about placing a car on the rails of another company. I am talking about where you haul the train with your own power over the rails of another company up to the terminus of the railroad.

Mr. Beyers: Yes, in that case.

Mr. Shaw: Any other case?

Mr. Beyers: I rather think there is such a situation at Peoria.

Mr. Shaw: Now, as a general proposition it is a fact, is it not, that when a railroad company brings in freight with its own crews, and with its own power, it is supposed to send word to the shipper that the freight has arrived before demurrage begins to run.

Mr. Beyers: Yes, ordinarily I quite agree with you. There is just the point I was trying to make it clear to you that I thought at the Union Stock Yards there was an entirely different situation. Here is the Union Stock Yard & Transit Company, a part of the Chicago Junction Railway, which acts as a common carrier, and intermediary between the Chicago Junction and the consignee.

Mr. Shaw: Well, as a matter of fact, the Union Stock Yard & Transit Company and its officials do not negotiate for you with respect to trackage rights, or the movement of your trains on the Chicago Junction Railway, do they?

"Mr. Beyers: No, sir, not as such.

Mr. Shaw: And as a matter of fact there is a different general manager for each of the two companies and a different president?

Mr. Beyers: I assume there is.

Examiner Thurtell: What two companies are you referring to?

Mr. Shaw: The Chicago Junction Railway Company.

Examiner Thurtell: And what other?

Mr. Shaw: And the Union Stock Yard & Transit Company of Chicago.

Examiner Thurtell: Is the present Union Stock Yards Company still called the Union Stock Yard & Transit Company?

Mr. Shaw: Yes, sir, just exactly as they have been known since 1865.

Examiner Thurtell: Although they do not run the Transit Company?

Mr. Shaw: No, sir, although they run the yards and the hotel company there, they do not have anything to do with the railroad, any more than some truckster on the street.

Mr. Dickinson: They do just as much as they did when the Supreme Court held that they were common carriers. You have not changed your practice.

Mr. Shaw: Yes, sir, we have changed our practice considerably.

Mr. Dickinson: Well, it is in the record, then.

Mr. Shaw: Of course, it is all right for counsel to interpolate; the fact that they are both common carriers does not make them one and the same. Mr. Dickinson knows that and except for his effort to be a little irritating, he would not do it at all.

Mr. Dickinson: I beg your pardon.

"Mr. Shaw: He is too good a lawyer to try to get away with it.

Mr. Dickinson: I think the record shows it.

Mr. Shaw: He is trying to be irritating.

Now, Mr. Beyers, if the Union Stock Yard & Transit Company did not check the freight that came out of each one of these cars of live stock, and the condition of the cars, the Chicago & Northwestern Railroad Company would have to have a checker there of its own for every car it brought in, wouldn't it?

Mr. Beyers: In order to make that check, yes.

Mr. Shaw: The fact that the Union Stock Yard & Transit Company checks this freight for the Northwestern Railway Company and takes care of it, that is a considerable service to the Northwestern Railroad Company, is it not?

Mr. Beyers: Some service, yes, sir.

Mr. Shaw: Do you know of any compensation that the Northwestern Railway Company pays to the Union Stock Yard & Transit Company for this service which is rendered by the Yard Company to the railroad company, except its so-called loading and unloading charge?

Mr. Beyers: That is all we pay.

Mr. Shaw: Now, you said something about the shipper or consignee doing the loading and unloading at country points, and you also named in connection therewith, I believe, that when you delivered on the private switch tracks of certain packing houses in Iowa, they did their loading and unloading. Mr. Beyers: Yes, sir.

Mr. Shaw: There is no two dollar terminal charge there at those places, is there?

Mr. Beyers: There is no terminal line involved.

Mr. Shaw: Now, as a matter of fact, in the two dollar terminal charge, there is collected as one of the reasons for the imposition of that charge, the fact that at this

"market you do the loading and unloading, is there not? I am not saying,—do not misapprehend. I will say that I do not claim it is not sufficient: I simply say that one of the reasons for which you allow the two dollar terminal charge is that at this market your company performs the service of loading and unloading live stock.

Mr. Beyers: That is not the way I understand it.

Mr. Shaw: When you figured it up in your figures in the two dollar terminal case, didn't you show a service of loading and unloading?

Mr. Beyers: I do not understand that the two dollar terminal charge was allowed because we had to unload, if I understood your question.

Mr. Shaw: I didn't say whether you had to unload. I said because you unloaded at this market.

Mr. Beyers: I understand the two dollar terminal charge to include the 25 cents for unloading.

Mr. Shaw: Unloading? Mr. Beyers: Yes, sir.

Mr. Shaw: That is a service which you were doing at this market.

Mr. Beyers: I understand—

Mr. Shaw: There is no such terminal charge at any other market that you know of? Mr. Beyers: On live stock?

Mr. Shaw: At these small shipping places where you said the shippers loaded and unloaded. Mr. Beyers: No, sir.

Mr. Shaw: At those places you have not held yourself out for forty years as doing that service there, have you, loading and unloading?

Mr. Beyers: How do you mean that, Mr. Shaw?

Mr. Shaw: I mean that while at Chicago you have performed the service of loading and unloading since 1865, at these small places in the country where there

"may be a small chute or private switch track, you have never done it? Mr. Beyers: No, sir.

Mr. Shaw: You have always done it here.

Mr. Beyers: No, sir, you did it and we paid you for it."

Pages 535 to 539, Both Inclusive.

"Mr. Beyers: We have never been called upon to pay for the use of their facilities until this summer, when they notified us that they would discontinue their tariff; they proposed to discontinue their tariff, naming loading and unloading charges, and would make no charge for that service, but contemplated making a greater charge for the use of facilities.

Mr. Cowan: Now by the term "facilities", you mean here the place where you unload cattle out of the car onto the platform, to the chutes to go down into the pens, I presume?

Mr. Beyers: That is what I would term the facilities.

Mr. Cowan: That is the facilities for unloading.

Mr. Beyers: Facilities for unloading.

Mr. Cowan: And it is used for no other purpose, except for either unloading or loading? Mr. Beyers: Yes, sir.

Mr. Cowan: And the purpose of setting the cars there on the tracks, which you pay the trackage for, is so that the unloading will be accomplished by that means, by somebody. Somebody will do the unloading.

Mr. Beyers: That is the object.

Mr. Cowan: Now, is it your understanding that you are to do the unloading or the Chicago Junction Railway, to who you pay the trackage, is to do the unloading, or the Stock Yards Company is to do the unloading?

Mr. Beyers: It has always been my understanding that after a car of stock is placed upon the track of the

"Chicago Junction Railway serving the platforms, chute and sidings of or in the stock yards, that the unloading would be done by, as I have known it, the Union Stock Yard & Transit Company, which I figured was that part of the organization which had charge of the yards and pens.

Mr. Cowan: So you have no charge to make against the shipper for that?

Mr. Beyers: I do not know that I understand your question exactly.

Mr. Cowan: Well, as you don't do it, and we understand they do do it, you make no charge against the shipper for that? Mr. Beyers: No, sir.

Mr. Cowan: And you have never filed a tariff, so you do make a charge against the shipper for that?

Mr. Beyers: No, sir, because we never performed the service ourselves.

Mr. Cowan: Now, it seems to me we did have some controversy about who was going to collect this 25 cents, and some way or other it turned out that now the Chicago Northwestern Railroad puts that 25 cents on the billing that is turned over to the Stock Yards, is that correct?

Mr. Beyers: It is a legal charge according to the tariffs on file.

Mr. Cowan: Now, I am not asking you the legal charge. You do what I have just remarked, don't you? Put the charge on the billing you turn over, 25 cents?

Mr. Beyers: We put the total transportation charges as covered by tariffs on file with the Commisson, on the bill for collection.

Mr. Cowan: We will get to that in a moment. You put this 25 cents on the bill, don't you?

Mr. Beyers: That is included, yes, sir.

"Mr. Cowan: Your company does it? Your agents put that 25 cents on there? Mr. Beyers: Yes, sir.

Mr. Cowan: And you intend it shall be collected from the shipper when you do that?

Mr. Beyers: For the account of the Union Stock Yard & Transit Company; when we do that and so indicate on our expense bill.

Mr. Cowan: You intend it shall be collected from the shipper when you put it on the bill? Mr. Beyers: Yes, sir.

Mr. Cowan: For what? Mr. Beyers: For what it indicates.

Mr. Cowan: Well, what does it indicate?

Mr. Beyers: It indicates the charge of the Union Stock Yard & Transit Company.

Mr. Cowan: Well what concern have you to collect that?

Mr. Beyers: Why that is the common custom in the Chicago District. When it comes to handling charges covering road haul service, where the road haul carrier makes delivery to a terminal carrier, and where the terminal carrier makes the actual delivery to the consignee, in such cases the practice in the Chicago District is for the road haul carrier to show on its bills the total charge to collect of the consignee.

Mr. Cowan: Well, it is also required, as you understand it, by the Act to Regulate Commerce, that there shall be no charge made except those rates which have been filed in the tariff, is that correct?

Mr. Beyers: That is attempted, yes, sir."

Pages 542 to 544, Both Inclusive.

"Mr. Cowan: Well, suppose it did take effect, would there be any change in the method of handling the cattle? The Stock Yards Company would still handle it just the same as they do today.

"Mr. Beyers: I assume so; I don't know.

Mr. Cowan: The right to use those facilities inures by virtue of the fact, as you understand it, that you pay the charges to the Junction Railroad.

Mr. Beyers: We have not any understanding with the Chicago Junction Railway that would change the arrangement which was made when the trackage charge of 75 cents per car was agreed upon, as I have previously stated, and our president so advised President Spohr, that we assumed that this trackage charge included the use of the facilities at the stock yards.

Mr. Cowan: For unloading? Mr. Beyers: For unloading.

Mr. Cowan: And unloading?

Mr. Beyers: Now, the act of loading was a separate transaction.

Mr. Cowan: Still it include the use of facilities by you for that purpose.

Mr. Beyers: Not by us. We have never been prepared to admit that we unloaded the stock. We pay for the unloading, but the actual act of unloading has been performed by some one else, the Union Stock Yard & Transit Company.

Mr. Cowan: But you have paid 25 cents a car for it?

Mr. Beyers: For the unloading, yes, sir, we have not done the work ourselves.

Mr. Cowan: You had it done; you did talk of going down there and doing it yourselves, did you not?

Mr. Beyers: Not the unloading, no.

Mr. Cowan: When you paid for having it done, was it your service you were performing?

Mr. Beyers: I would not think so. I think it is the service that is performed entirely for the consignee.

Mr. Cowan: Why did you pay for it if it was not your business to do it?

"Mr. Beyers: Well, it is the terminal charge, Judge.

Mr. Cowan: I thought you said you got the right to the use of the facilities for unloading, for the trackage charge.

Mr. Beyers: The use of the facilities.

Mr. Cowan: You would pay somebody to do the unloading. Mr. Beyers: Yes, sir.

Mr. Cowan: Now, that is what you have been doing all the time. That is all. Mr. Widdicombe: That is all, Mr. Beyers."

EXCERPTS FROM TESTIMONY OF L. C. MAHONEY ASSISTANT GENERAL FREIGHT AGENT CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ORIGINAL EXHIBIT No. 6, PAGES 571 TO 583, BOTH INCLUSIVE.

"Mr. Mahoney: I have no figures on that, Mr. Burgess. It is true that generally speaking at the terminal markets with the exceptions I have noted, we do absorb the loading and unloading charges. Now, just what percentage of the total live stock movement that the Burlington Railroad handles is handled into these primary markets, I am not in a position to say.

Mr. Burgess: My question was as to the absorption of loading charges only.

Mr. Mahoney: Loading? Mr. Burgess: Yes, sir.

Mr. Mahoney: Pardon me, I misunderstood you. The percentage of live stock traffic handled by the Burlington Railroad on which we absorb the loading charges would be very, very small. It would only be that part of the traffic that was loaded at these primary markets, and I do not hesitate to say that the percentage of our traffic that would be handled at those markets, loaded at those markets I mean is, as I said, very, very small.

Live stock originates out in the country and is shipped to these primary markets, and it is loaded by the shipper at these country stations.

Mr. Burgess: Has your company reaped any financial

"benefit whatsoever from the increase in the loading and unloading charges as filed by the Union Stock Yards & Transit Company in its tariff with the Interstate Commerce Commission? Mr. Mahoney: No, sir.

Mr. Burgess: Did you shortly after the Union Stock Yard & Transit Company's tariff carrying these increased charges became effective, receive a request from Armour & Company that you absorb the increased charge?

Mr. Mahoney: Did you say, asking us to absorb them? Mr. Burgess: Yes.

Mr. Mahoney: Yes, sir, we did.

Mr. Burgess: In what form did you receive that request?

Mr. Mahoney: That was a letter from Armour & Company, signed by Mr. W. W. Manker.

Mr. Burgess: What date? Mr. Mahoney: May 16, 1917.

Mr. Burgess: Kindly read it.

Mr. Mahoney: It is addressed to Mr. C. E. Spens, who at that time was assistant freight traffic manager of the Chicago, Burlington & Quincy Railroad.

Mr. Norton: What is he now? Mr. Mahoney: Vice President in charge of traffic.

Mr. Norton: What is he doing?

Mr. Mahoney: Just at the present time he is connected with the Food Administration at Washington, their traffic director, but he still holds the position of vice president of the Burlington Railroad:

'DEAR SIR:

You no doubt are aware that the Union Stock Yards & Transit Co., increased their charges for loading and unloading live stock at the Union Stock Yards, Chicago, effective May 21, 1917, as follows:

For loading from 50 to 75c per car.

For unloading from 25 to 50c per car.

Has your company made arrangements to correct

'your tariff authorizing the absorption of the increased charges? If not, what action do you propose to take?

Please advise.

Yours truly,
ARMOUR & COMPANY,
W. W. MANKER.'

Mr. Burgess: What reply was made by your office?

Mr. Mahoney: Mr. Spens replied to that letter under date of May 17, 1917, as follows:

'*Mr. W. W. Manker,*
Assistant Traffic Manager,
Armour & Company,
Chicago, Illinois.

DEAR SIR:

Referring to yours of the 16th, file C-811-18, relative to increased charges for loading and unloading live stock at the Chicago Union Stock Yards.

I understand it is not the intention of any of the Chicago carriers to absorb this increase out of their earnings, but that the increase will be added to the freight charges which the shippers pay.

Yours truly,
C. E. SPENS,
Assistant Freight Traffic Manager.'

"Mr. Burgess: Mr. Mahoney, why did your company after publication of this tariff by the Union Stock Yard & Transit Company carrying these increased charges, add to the freight bills as collectible against the shipper, this amount?

Mr. Mahoney: Because we had been advised by our own legal department, and I also heard the same statement made by the legal departments of the various other carriers, and in addition to that the same opinion was expressed by a lawyer representing the Union Stock Yards Company at a conference at which I was present, that the carriers could not legally absorb the additional 25 cents, without making some correction in their tariff that was filed with the Interstate Commerce Commission.

"Mr. Burgess: You may cross examine.

Mr. Shaw: You do not refer to me when you say, "Some lawyer representing the Stock Yards," do you?

Mr. Mahoney: No, sir. Would you like to have me tell about that conference?

Mr. Shaw: Yes, I would like to have you if you would like to have me tell how that gentleman happened to be there, and how little he knew about the matter before he went.

Mr. Mahoney: I can state that he said he knew very little about the situation.

Mr. Shaw: The instant he knew about the situation of the Stock Yards Company he withdrew that opinion.

Mr. Burgess: May I ask Mr. Shaw for my information—

Mr. Shaw: More than that, he might have been mistaken about the law.

Mr. Burgess: May I ask this question for my own information?

Mr. Shaw: Of me? Mr. Burgess: Yes, sir.

Mr. Shaw: Yes, sir.

Mr. Burgess: Do you contend that the tariff as filed by you was not a lawful charge against the shipper?

Mr. Shaw: No, I contend that the tariff as filed by us was void from the beginning; it ought never to have been covered by the tariff, just the same as if it had never been filed.

Second, that if I am wrong as to that, and I do not think I am, that that tariff notified every person for whom we act as the carrier's agent, that we will charge them for that service more than we have previously charged, to the extent that the tariff increased the rates; there was notice to the carriers to that effect and they did not object to it.

We have a right under that tariff to collect from the

"same people that have been paying us since 1865, the advanced charge; that is my contention.

Mr. Burgess: Now, I do not know whether I fully understand you. My question is this,—if you do not care to answer it,—

Mr. Shaw: I will try to answer it as fairly as I can.

Mr. Burgess: I want to know for my own information, do you now contend, Mr. Shaw, that the tariff which you filed does not create a lawful charge against the shipper, as filed with the Commission?

Mr. Shaw: The tariff which we filed in my judgment, if it is a tariff at all, increases the charge to the people that have always paid us for the service, and not to the shipper; that is a fair answer, isn't it?

Mr. Burgess: I think so. Do you think it would have been lawful for the carriers,—the line-haul carriers under the tariffs as they were then filed, to have absorbed the additional charge?

Mr. Shaw: I do, and I say that for the reason first, the tariff not being properly on file at all, is the same as if it had not existed.

Second, because as carrier's agent, we did this service for these people, and if it was a lawful charge it was binding upon those for whom we performed the service and not for anybody else; that is my opinion about it.

Mr. Dickinson: I did not quite get the answer to that first question of Mr. Burgess', whether or not you considered it when it was on the files of the Interstate Commerce Commission, as necessarily a lawful charge?

Mr. Shaw: A lawful what?

Mr. Dickinson: A lawful charge; I mean by that one that had been proposed against the consignee or shipper, if the carriers' tariff did not authorize an absorption of more than 25 cents.

Mr. Shaw: I will try and answer it again. I think the tariff was void from the beginning, just the same as if

"there had been no tariff. The relationship in my judgment still existed; our filing that tariff was wholly superfluous. It is not in fact a tariff charge.

Now, if I am wrong as to that, then I say that the plain phraseology of the tariff shows that we proposed to increase the charge for the service which we rendered to those for whom we have always rendered it, to-wit, the carriers, whose agents we are, and not to any shipper in the United States.

Mr. Dickinson: Let me ask it a little differently: take the present situation as it stands, the tariffs on file with the Interstate Commerce Commission, the tariffs of the carriers authorizing only 25 cents absorption, the law requires that the lawful tariff rates be assessed against the consignee.

Is it your position that it was necessary under the law, and is now necessary under the law, to assess against the consignee on this $50 example that the Examiner has taken up this morning, a total charge of $52.25.

Mr. Shaw: I do not. I think the carriers just assessed it in order to transfer a charge which they knew they would have to pay themselves if they did not. The carriers are getting it out of the shippers right straight along; it would not have been gotten out of the shippers if it had not been done that way.

Mr. Dickinson: You still maintain after all that has been said that the carriers are getting this 25 cents?

Mr. Shaw: Yes, sir, I certainly do. They still have 25 cents more in their treasury than if they had not plussed the rate.

Mr. Dickinson: We will stand on the record on that question.

Mr. Shaw: The record for that is this: you send us your bills out there to collect. Assume the rate is $50; we would have collected the $50 rate and when we re-

"turned the money to you we would have given you $49.75. You would then have been shy a quarter, wouldn't you?

Now, you charge $50.25, and we collect out of it 25 cents, and get you back your $50. In the one instance you have $49.75, and in the other $50, and you have 25 cents extra in your treasury, and that you would not have otherwise. We gave you the option of going down there and collecting your own bills, but you did not do that because we can do it so much cheaper than you can.

Mr. Dickinson: You do not agree with the testimony of this witness that the Burlington Railroad has not benefited one cent.

Mr. Shaw: No, sir, I do not agree with that, and I think he will agree with me before I get through, after I cross examine him.

Mr. Burgess: I would like to ask you this question; whether it is your position at the time you published your tariff charge increasing the loading and unloading charges, that the shippers and the railroads were on notice that that was a void tariff?

Mr. Shaw: They were on notice to the same extent that anybody is on notice, and everybody is on notice of a wholly superfluous action.

Mr. Beyers: I am very much interested in the tariff feature of it, and if I may be permitted, I would like to ask Mr. Shaw how the shipper of a carload of live stock, by examination of the tariffs on file with the Interstate Commerce Commission, involving all of the interests that are going to handle his stock are going to know that this tariff filed by the Union Stock Yard & Transit Company is not a tariff, as you are pleased to term it.

Mr. Shaw: Well, in the same way that any inquiry,—by what I conceive to be any good lawyer, or the court itself, or anybody reading this tariff could tell that it was never intended to collect it from the shipper.

"Examiner Thurtell: What you want is a good lawyer, you see.

Mr. Shaw: I have frankly said over and over again that my company badly blundered when they ever filed the first tariff.

Mr. Beyers: How is the shipper going to know that?

Mr. Shaw: The shipper is going to know it, so far as this thing is concerned by looking at it. The charge made by this company for the service is as the carrier's agent; he has that notice, and that is notice to the carrier.

Mr. Beyers: What right did you have to set yourself up as carrier's agent?

Mr. Shaw: You have employed us ever since 1865.

Mr. Beyers: No carrier is a participant to that issue.

Mr. Shaw: The person to whom service is rendered does not have to participate in the tariff in order to make it binding upon a person; the reason we are your agent is because you employed us as that from 1865, from that date down to this.

Mr. Beyers: We are not employing you to unload.

Mr. Shaw: There is no better proof of agency could exist in the world than was created in 1867 when the railroads constructed these yards down here and then paid the Stock Yards Company 25 cents a car for doing the service."

EXCERPTS FROM ORIGINAL EXHIBIT NO. 7, PAGE 861.

"Mr. Cowan: I wish to call the Examiner's attention at this time to the language in the second paragraph of the order reading:

> 'That these proceedings be, and they are hereby, reopened for further hearing, on the question of the amount of the loading and unloading charges for live stock, at the Chicago Stock Yards, and the amount of such charges, if any, that should be imposed upon shippers of live stock, or should be absorbed by the defendants and whether the Chicago Stock Yards are terminals of the Chicago Junction Railway Company, and whether the tariff arrangements between the Union Stock Yard & Transit Company and the other defendants with respect to the delivery and handling of live stock at the Union Stock Yards in Chicago are in compliance with the Act.'"

EXCERPTS FROM THE TESTIMONY OF H. R. PARK, TRAFFIC MANAGER, CHICAGO LIVE STOCK EXCHANGE, ORIGINAL EXHIBIT NO. 7, PAGES 890 TO 892, BOTH INCLUSIVE.

"Q. (By Mr. Norton) Those are commission-made rates, are they?

A. Yes, sir, in tariffs properly on file with the Interstate Commerce Commission.

Q. (By Mr. Cowan) They were similarly related previous to the time the Commission passed on them, weren't they?

A. Prior to the 5 per cent and 15 per cent and 25 per cent advances that have been made, they were made by the carriers themselves.

Q. He asked if they were Commission-made rates?

"A. They are Commission-made rates after the Commission approved of the 5 per cent and 15 per cent and 25 per cent and other increases that have been added from time to time.

Q. (By Mr. Norton) Then they are Commission-approved?

A. I should say properly so, yes.

Exam. Gerry: At present they are presidentially-initiated rates.

Mr. Hillyer: What does that mean?

Mr. Helm: May I ask a question?

Q. (By Mr. Helm) What time was it that this 50 and 75 cent charge went into effect?

A. May 21, 1917.

Q. And it has been suspended by the Commission?

A. No, sir, it is in effect.

Q. (By Mr. Helm) It is in effect now, is it?

A. It has operated and been effective since that date, Judge Helm.

Q. 1917? A. Yes.

Q. Now, at that time or since that time, have there been any corresponding changes at these other markets that would restore the former relationship?

A. No, sir, other than that the carriers, I think, a couple of weeks ago, corrected their tariffs so as to absorb the loading and unloading charge at Toledo, Ohio, and I also understand there has been an official order originating at Washington unifying the tariff regulations covering the absorption of loading and unloading charges, though they seem to call them, I understand, facilities and services rendered by public stock yards to carriers."

EXCERPTS FROM TESTIMONY OF O. T. HENKLE, GENERAL MANAGER UNION STOCK YARD & TRANSIT COMPANY, ORIGINAL EXHIBIT NO. 7, PAGES 975 TO 979, BOTH INCLUSIVE.

"Q. Do you get any compensation for the use of those valuable facilities, except what you get out of this so-called loading and unloading charge? A. No, sir.

Q. That covers all of this investment, and all of the service that you render?

A. That is the only return we get on it.

Q. In addition to this return for those facilities, do these services that you render there save the carriers immense investments, far in excess of the one you just mentioned, in equipment, and engines, and matters of that kind, in your judgment?

A. They do. It would be necessary for them to have pens back of those chutes in order to be of any use to them, which I have not taken into account.

Q. And if you can unload a train in a few minutes, and release all of that equipment, fifty cars, worth $2000.00 per car at the present prices, there is another hundred thousand dollars in investment that you are saving the railroads, is it not?

A. Well, we are enabling them to use the equipment, yes.

Q. Under the tariffs these shippers are entitled to 48 hours free time, are they not?

A. I believe that is the rule on freight of all kinds.

Q. It is the same rule on this. If those shippers were not able to get the benefit of this unloading service, and

"they used up some or all of the 48 hours free time, it would necessitate the increased investment of those carriers in equipment of untold millions of dollars, would it not? A. Yes, sir.

Q. And in addition to that, there are tremendous economies in the saving of labor of train crews. A. Yes, sir.

Q. Do you know whether these team tracks in Armour & Company here belong to the Chicago Junction Railway, or whether that is on Armour's property?

A. I do not know. I imagine some of them are owned by Armour, and some by the railway.

Q. Well, if they are, if those tracks shown here from Morris and Armour are the industry tracks of those people, those interests, your answer to Mr. Norton's question would be a very simple one, would it not, that you do not want to pay them anything for the use of their own tracks. A. Yes, sir.

Q. He asked you about that, whether you expected them to compensate you for the use of those tracks.

A. I did not understand that he referred to an industry track which the industry owned and paid for, as their own track. I thought he meant on the Chicago Junction rails, up to the chutes.

Q. It is not customary, is it, for an industry which owns its own tracks to receive any compensation for the use of its industry tracks? A. No.

Q. It is a benefit to the shipper as well as the carrier. A. Yes, sir.

Q. A mutual benefit. A. Yes, sir.

Q. There is no similarity, is there, between an industry track owned by Armour & Company for the loading out of canned goods, and the tracks that you furnish down here for the unloading of live stock? A. No, sir.

Q. There is no similarity whatever?

"A. No, sir.

Q. No comparison? A. No similarity of use?

Q. No basis whatever to compare them? A. No, sir.

Q. As to these shipments that come in, that are not consigned to anybody: Mr. Brophy down there told me that that was a more or less frequent occurrence, that they had a carload of live stock on their hands, turned over to them by the railroad, that they did not know what to do with, and they just simply had to take care of it, feed it and water it. Now, when you are doing anything like that, do you regard it as a service to the railroad? A. Yes, sir.

Q. What could they do with the live stock if you did not do it for them?

A. Well, they would have to provide pens away from those unloading chutes to take care of them until the consignee appeared.

(pp. 995-998, both inclusive):

Q. Now, you perform other services, I understand, for the railroads, than the unloading of these cars. A. Yes, sir.

Q. That entails the employment of a considerable number of employees, does it not, to attend to the other service. A. Yes, sir.

Q. You collect all the freight for them, do you not? A. Yes, sir.

Q. And settle with them? A. Yes, sir.

Q. You take charge of the way-bills, or the bills of lading, do you not, or the live stock contracts, or whatever paper there is?

A. It finally passes through our hands, yes, sir.

Q. It passes through your hands? A. Yes, sir.

Q. And you check the condition of the carloads of cattle as they come in? A. Yes, sir.

Q. And make a report as to the number of dead and

"injured, or wounded, or those with any other trouble? A. Yes, sir.

Mr. Winston: They maintain a casualty station, is that what you mean?

Mr. Helm: Yes, a casualty station. The Witness: Yes.

Q. (By Mr. Helm) You do the work which gives the railroad the information upon which to base their settlement with the shippers for loss and damages, do you not? A. Yes, sir.

Q. Do you get any pay for that?

A. Nothing other than this so-called loading and unloading charge.

Q. Of 25 cents per car; is that all you get? A. 50 cents per car now.

Q. How? A. 50 cents.

Q. 50 cents per car, yes. A. That is all we get.

Q. 50 and 75. A. That is all we get.

Q. What other service do you render?

A. Mr. Examiner, in the last hearing we read a detailed statement of the services we perform.

Q. Is that in the record now?

A. That is already in the record in full, showing all of the different service that we perform.

Mr. Helm: Then I will not ask you to repeat that.

Q. (By Mr. Hillyer) Did you say that this labor cost that you show here included counting the live stock out to the consignee?

A. The delivery count, yes, sir.

Q. (By Mr. Helm) Now, Mr. Henkle, if you say that that matter is all in the record, I will not ask you to repeat it. But you say that this track, this real estate, and the tracks and improvements that are located on there—

"Mr. Winston: Now, there is no question of tracks. Do not forget that.

Q. (By Mr. Helm) —are devoted entirely to the performing of a service for the carriers in unloading their carload shipments.

A. We have in the past performed it as, as we considered it, the agent of the carriers."

EXCERPTS FROM THE TESTIMONY OF D. C. MOSIER, CHAIRMAN OF THE TRANSPORTATION COMMITTEE OF THE CHICAGO LIVE STOCK EXCHANGE, ORIGINAL EXHIBIT No. 7, PAGES 1027 TO 1032, BOTH INCLUSIVE.

"Q. You are thoroughly familiar with the conditions of unloading and loading stock?

A. Yes, sir. I started in at the yards at the chutes.

Q. As a—

A. As a yard man.

Q. What would be the practical result if the shippers should undertake to unload the live stock as it comes in?

A. For the shippers themselves?

Q. Yes.

A. I think that is a physical impossibility for the shipper himself to unload live stock. The conditions there would not allow it.

Q. I know, but take a carload of stock coming in from the country, take this train load of 44 cars on the Northwestern; about how many shippers do you suppose, on an average, would be represented in that 44 cars of stock?

A. That all depends on where that stock originates. If it is western stock it might be one man, or two; if native stock, 20 or 25. Sometimes you get in one of these cabooses and you think there is a regiment in there.

"Mr. Norton: If the Commissioner please, at the former hearing, when Mr. Winston was not present, this was fully gone into, and the statement made by the railroads that they do not expect the shippers to go into the stock yards.

The Witness: A physical impossibility.

Mr. Norton: We are not contending they ought to do that.

Mr. Winston: I simply want to bring out the fact that if the carriers insist on the shippers unloading their stock, additional facilities will have to be furnished by the carriers.

Mr. Norton: We do not insist on that. We think in view of all the money you get from the shippers, you might unload it.

Mr. Winston: Do you still contend we are getting so much money out of this charge?

Mr. Norton: No, out of the handling of the live stock, out of the 14 charges in the record in this case, the 14 charges carried in the bill.

Mr. Winston: The Supreme Court has said—

Com'r Aitchison: Let us address ourselves to the witness:

Mr. Winston: Will you read my last question, please?

(Record read as above recorded.)

Q. (By Mr. Winston): That would be an average of about ten shippers to a train load; is that a fair statement?

A. I should think so, estimated, yes, sir.

Q. And the cars come in at all hours of the night? A. Yes, sir.

Q. If those shippers were furnished platforms and loading docks and chutes, just that and nothing more, how long do you think it would take them to unload those cars? A. The 44 cars?

"Q. Yes. A. It might take them two hours and it might take them three hours.

Q. How many men usually accompany a carload of stock into Chicago?

A. There cannot over one accompany one.

Q. Could one man unload his stock shipment in that time, in two or three hours? A. Unload one car?

Q. Yes. A. Yes, sir.

Q. Then in the meantime there would be no room for any other train to come on this unloading dock. A. No, sir.

Q. What is the average time of unloading a carload of stock at the yards, under the present method?

Mr. Norton: That is objected to, as having been fully shown yesterday.

Exam. Gerry: It has been very well covered. As the Examiner noted yesterday, the Commission has already made a finding in respect of the time.

Q. (By Mr. Winston) After the shipper took the live stock into the pens, what would he do with it then?

A. Into the chute pens? Q. Yes.

A. Why, it would be impossible for him to do anything with them.

Q. Could he sell the cattle in the chute pens?

A. Not very well. Under present market conditions he could not. There are no watering facilities or feeding facilities in the chute pens.

Q. Would he have any practical method of emptying those chute pens so that another train load could come in after the first train load had been unloaded in the first three hours?

A. Do you mean for the shipper to do it? Q. Yes.

A. No, sir, he could not. In the first place, these chute pens are under lock and the Stock Yard Company would have to unlock the pen.

"Q. I am assuming the shipper had control of the pens.

A. No practical way for the shipper himself. It is a physical impossibility for the shipper to handle his own live stock coming into the yards.

Q. And if a shipper did undertake to unload his own live stock, what would the railroad company have to do besides furnishing the loading and unloading docks, from which they take it off? Would they have to count the cattle out?

A. The cattle would have to be delivered to the shipper and counted.

Q. And how about freight charges?

A. They would have to collect them from the shipper or his representative.

Q. And how about crippled animals?

A. They would have to be accounted for to the shipper. You mean the shipper to sell his own stuff?

Q. I mean the shipper should make delivery himself.

A. They would have to accounted for to the shipper.

Q. So the effect of having the shipper unload his own stock would require, first, that some unloading dock and chute pens be established at the unloading point?

A. Yes, sir.

Q. Second, that on account of the extra delay by the shipper unloading, those chute pens and docks would have to be increased considerably over what they are at the stock yards? A. Yes, sir.

Q. Third, the carriers would have to have some agents present to count out the cattle, to make delivery, get receipts, take care of the cripples and collect freight charges? A. Yes, sir.

Q. And to notify consignees? A. Yes, sir."

EXCERPTS FROM THE TESTIMONY OF A. SYKES, FARMER, IDA GROVE, IOWA, AND PRESIDENT OF THE CORN BELT MEAT PRODUCERS ASSOCIATION, ORIGINAL EXHIBIT NO. 7, PAGES 1077 TO 1091, BOTH INCLUSIVE.

"Q. There has been some time spent here with regard to free time of unloading carload freight, the law with respect to unloading live stock; you could cut that out of consideration entirely, couldn't you? It has got to be unloaded?

A. Yes, absolutely. The railroads have to unload it whether they want to or not and the shippers have to have it loaded whether they want to or not. Live stock is considered a perishable commodity and is handled as such and must be handled in that way.

Q. Now, with respect to the matter of the amount charged, assessed against the shipper; is he charged at any other market than Chicago for the extra expense the railroad is put to for unloading the live stock?

A. No, sir; the shipper is not. That is, so far as I know. Of course, he is not at the Missouri River markets.

Q. And never has been? A. No, sir; there never has been any charge against the shipper.

Q. And after the terminal charge for the use of the tracks of the stock yards was imposed, after a long fight on the two dollar terminal charge, the railroads continued to unload and absorb the unloading charge of 25 cents? A. Yes, sir.

Q. At other markets the amount is fifty cents, but in neither case is the shipper interested in the amount; that is, between the stock yard company and the railroad? A. Yes, sir.

"Q. The stock yard company, as far as the shipper is concerned, is the means whereby the railroad performs the service to the shipper, and the railroad pays for it, and as far as the shipper is concerned, that is what we are contending they should do? A. Yes.

Q. This 25 cents; do you know how it comes that the shipper has to pay this 25 cents?

A. I don't know as I quite get your question, Judge.

Q. How does it come that the shipper has got to pay this additional 25 cents put on here? There is one 25 cents here that the shipper does not have to pay?

A. Yes, absorbed by the railroads.

Q. Now, the other the shipper had to pay? A. Yes.

Q. Is it your understanding that the stock yards company does not want to collect it?

A. Yes, that is my understanding of the case.

Q. And the railroad company claims they are not levying that as against the shipper? A. Yes.

Q. So the dispute is between the Stock yards company and the railroad company as to who must pay that 25 cents?

A. That is my understanding.

Q. But the shipper is paying it? A. The shipper is paying it, yes.

Q. If the stock yards company had been permitted to have cancelled their tariff which put that 25 cents into effect you shippers would not have had to pay it?

A. No, sir; that is my understanding.

Q. And the shipper does not want to pay it? A. No.

Mr. Norton: Will the witness Cowan tell me who would have had to pay it?

The Witness: There would not have been any. I would like to say to you, in regard to this matter right here, that so far as this controversy existing between the stock yards and the railroad is concerned, we do not

"care to mix in it at all as shippers. We have nothing to do with it. We want that distinctly understood. We feel that that is just one trying to pass the buck to the other, as far as that is concerned. The only thing we are interested in is that we feel that this rate when it was made was made to absorb the unloading charge, if any; the rate was made high enough to take car of that unloading charge, if there was any.

Q. (By Comm. Aitchison) Just which rate are you talking about that you said was made then? Do you mean the general rate on live stock? A. Yes.

Q. And you are not talking about any particular advance?

A. No, no advance, but the general rate on live stock. The Commission has passed on all of our rates time and again and especially in 1910, the Corn Belt case, that was gone over by the entire Commission, and that is our position in the matter, that we feel that that rate was high enough to absorb the unloading charge, if there was any, and we feel that it is unjust to the shipper to now saddle that unloading charge off onto him. That is our position in the matter. So far as the controversy between the stock yards people and the railroads is concerned, we are absolutely neutral. It is a question for them to fight out among themselves.

Q. (By Mr. Hillyer) In other words, your position on that is that in this process of passing the buck, as you call it, the farmer, who is the innocent bystander, gets left?

A. Yes, we were the fellows that the buck was passed to.

Q. Now, speaking about this question that Mr. Norton asked you about—I was asking you on direct examination about the practice of loading in the country and the practice of unloading in the city.

"A. Yes.

Q. He took you up on the question of legal liability for loading in the country and unloading in the city, and as I understood your direct testimony, you did not refer to the question of whose duty it was at all; you were merely testifying about the practice?

A. I was merely testifying about the practice; that was it.

Q. And what was actually done?

A. Yes. I did not know whose duty it was.

Q. For all you know, it is still the duty, under the decisions of the Supreme court, for them to load your live stock in the country?

A. Why, I don't know anything about that feature of it, when it comes to the legal part of it. As I said, I am a farmer and stock man. The unloading part of it and the position the cattle men have taken in regard to this stuff delivered at the market, I am familiar with that, because of cases that have come under my own observation, and I know how that goes, but on the question as to whose duty it is to load and unload stuff in the country, I know nothing about it. We simply do it because we won't allow the other fellow to do it, won't take the chance.

Q. That is as far as your testimony goes?

A. Yes. We don't know whether it is the duty of the railroad or not.

Q. (By Mr. Norton) I did not intend to get the witness' opinion on any law. I wanted the facts as he related them. A question I forgot to ask you is that in the handling of the live stock—I assume you are a heavy handler?

A. Not a big handler, no.

Q. How much moves back and forth, how much of a

"movement do you have back and forth from the ranges to your feeding places?

A. None at all. I always buy at the markets.

Q. Then the stock you ship to Chicago you buy—

A. I buy at the markets, unless I buy it in the country.

Q. What do you mean by buying at the market?

A. At the Missouri River markets, Sioux City, Omaha or Kansas City.

Q. I was under the impression that you were shipping from Ida Grove, Iowa, large quantities of cattle.

A. No, sir.

Q. Is there much cattle shipped from Ida Grove, or that region to Chicago?

A. Well, if you lived there a while you would think so. It is one of the greatest live stock sections in the world. We are a part of the country that is feeding the world.

Q. Now, the breeders and the growers that bring the cattle up for the markets, do they within your knowledge handle any important number back and forth between their pastures at distant points and their feeding places?

A. Over the railroads, no, sir, not in our state. We are a corn state. Bear in mind, Mr. Norton, that Iowa is a corn state. We do not raise cattle and ship them out to the ranges at all. We buy practically all of our feeders.

Q. Right at home?

A. Yes.

Q. Mr. Cowan called your attention to what he thought to be the fact, that there has been no advance in these loading and unloading charges at other places. Do you ship any stock to St. Louis?

A. No, sir. I know nothing about St. Louis.

"Q. Then the decision in the Dimmitt-Caudle case has not affected you then?" A. No, sir.

Mr. Norton: That is all.

Q. (By Exam. Gerry) Do you know any instance since June 21, 1917, when the increased loading and unloading charges became effective, that any carloads of live stock were diverted from the Chicago market because of those increased charges?

A. No, sir; I do not know of any such instance. There might be, but it never came to my knowledge.

Q. (By Com'r Aitchison) Have you made any inquiries as to that? A. No, sir; I have not.

Q. (By Mr. Helm) You spoke about live stock being considered perishable freight? A. Yes, sir.

Q. To handle? A. Yes, sir.

Q. Now, has it been your experience in Iowa in recent years that there was considerable irregularity as to the time when you could count upon trains being due at your point for the handling of live stock?

A. Yes, that is true, until the last sixty days, it has been quite irregular.

Q. Was that condition such that you could not with safety take your cattle to the stock pens until you had information as to when the train would be there?

A. Yes, sir; it was to such an extent that we would not dare to. Some of the fellows took chances and took their stock in and had to take them back home again.

Q. That is another reason, is it not, why you could not depend upon the railroads to handle your stock at the point of origin?

A. Absolutely so, yes, sir.

Q. You know of instances, do you, in which they have had to take their cattle back home?

A. It came right under my own observation. I helped

"to make out a claim for a young fellow who took his stock in and had to take it back home.

Q. (By Mr. Norton) Mr. Sykes, you spoke of the disinterestedness between the carriers and the stock yards people in this controversy on your part. I would like to ask you as a disinterested witness what you would say of the proposition that in view of the revenue which the stock yards company gets from you and other shippers it should in fairness take out your cattle and select them and put them in the yards as a part of its work, without additional charge?

A. Well, sir, now, Mr. Norton, I am not in a position to—I am no authority on that, because I don't know anything about the equipment and the expense attached to the operation of the stock yards a bit more than I do of the operation of the Northwestern Railroad. I would not be a competent witness to testify on that.

Mr. Norton: I do not know, Mr. Chairman, whether we have enough in the record about the charges over there, or whether you consider them material. There is a bill in, I think, showing eleven items of charges, which appear on the face of it, in these yards.

Com'r Aitchison: That appears in the record, doesn't it?

Mr. Norton: Yes, I think so.

Mr. Hillyer: That bill shows everything but the freight charges.

The Witness: That is all, is it?

Mr. Hillyer: Yes. (Witness excused.)

Com'r Aitchison: Have you any other witnesses at this time?

Mr. Cowan: If the Commissioner please, in connection with Mr. Sykes' testimony, which drew out the fact in regard to the stock yards company saying it does not want the 25 cents—

"Mr. Helm: From the shipper.

Mr. Cowan: From the shipper? Mr. Helm: Yes.

Mr. Cowan: And the railroads have no tariff against the shipper of 25 cents; hence they have got no claim, I suppose to the 25 cents, but we have to pay the 25 cents; because it is put on the railroad bill. Now, there are certain things I intended to ask of Mr. Henkle, which will probably be unnecessary, because I believe it is well known between the counsel, and it has been stipulated, if my memory serves me right, in the record here before, that there was no tariff other than the absorption circulars and the proposed cancellation of the absorption circulars, which were suspended. There were no tariffs of the stock yards company, except the 25 cents—I am speaking of the unloading—probably a supplement to it, and then a proposed cancellation which was suspended and left in that attitude at the previous trial. At that trial—I beg to call your Honor's attention to what I claim to have been in the record—these tariffs, all of the tariffs and the findings of the Interstate Commerce Commission with respect to the cases spoken of—those things could be considered and used in argument and cited in brief, to avoid the use of the time that would be required to dig out and present those things to your Honor.

The stock yards company then stated they desired to cancel the tariff putting that 25 cents on. The railroad company stated they did not object to what the stock yards company did; they could do whatever they wanted to. There was nobody in the inquiry being passed around the table who objected to the cancellation and the shippers thought they had nothing else to do except to ask the Commission to see to it that it was cancelled. There was no controversy except to ask the stock yards company to cancel its tariff, whatever might be the relation between them, until there was some further change

"in the tariff, so it would not be against the shipper, provided the stock yards company were permitted to cancel that tariff.

Now, I would like to ask here whether there is any change in the position of the stock yards company and the railroads now to what it was then with respect to the particular matter of the cancellation of the stock yards company tariff imposing the 25 cents. If not, I will assume that condition now exists as it did at the close of the hearing.

Mr. Helm: You are asking Mr. Norton that question?

Mr. Winston: I think he is asking me. Mr. Helm: Oh.

Mr. Winston: The stock yards company sought to cancel their tariff on the ground that they were not a common carrier subject to the Act. There is no question that the stock yard company wanted fifty cents. The Commission has held that we are a common carrier, subject to the Act, and until that is changed, why, we will have to file that tariff. That is all there is to it.

Mr. Cowan: Let me ask if that tariff is one that purports to charge it against the shipper?

Mr. Winston: No, that is a tariff that simply says fifty cents for unloading and 75 cents for loading. It is a matter of record with the Commission as to what the tariff does state.

Exam. Gerry: And since the tariff was issued increasing the charges 25 cents in each instance for loading and unloading no change has been made in the tariff of the carriers which reach Chicago, so that the tariffs of the carriers which reach Chicago are in the same position that they were before and they do not now absorb the additional 25 cents?

Mr. Norton: That is correct.

"Exam. Gerry: Otherwise the tariff situation is not changed?

Mr. Norton: That is correct.

Mr. Hillyer: But they continue to put this extra 25 cents in the freight bill as though there were a lawful tariff on file in Washington authorizing them to collect that?

Mr. Norton: No, there is a stamp put on the bill and the money is collected and kept by the stock yards people.

Mr. Winston: They collect all your freight charges?

Mr. Norton: There is a stamp of protest put on all bills, showing we have no tariff for it.

Exam. Gerry: Is it the purpose of the defendants to have a witness to show the tariff situation?

Mr. Norton: If the court wants it, but you stated it yourself, Mr. Examiner. We have not undertaken to change the tariffs as they existed, Mr. Chairman, and Mr. Examiner, because the litigation is in process, the petition for a rehearing was up and so forth and the thing has stood as it stood before. We are absorbing the loading and unloading, but not the advance.

Com'r Aitchison: You say you are stamping your bills under protest. Is that a different form of bill than the one which appears in the record as Coffey Exhibit 2?

Mr. Norton: I put in by Mr. Coffey some exhibit with a rubber stamp. That is it 'unabsorbed loading 25 cents.'

Mr. Winston: Is there any protest on that?

Mr. Norton: That is what it was, that we have no authority to charge that—we are not charging that or paying that. Of course, we have not tariffs to absorb it.

Exam. Gerry: Do the tariffs of the defendants provide that they will absorb all of the charges for loading and unloading or do they specify the amount of the charges?

"Mr. Norton: They specify the old amounts, 25 and 50 cents, 25 for unloading and 50 cents for loading. Now, that is a concurrence, Mr. Examiner, in the stock yard company's tariff and they have refused concurrence in the other tariff making the advances.

Mr. Winston: Now, the present tariff in effect is supplement No. 1 to I. C. C. No. 6, Union Stock Yard & Transit Company, and supplement No. 1 to stock yard tariff No. 3—I beg your pardon, it is Union Stock Yard & Transit Company tariff No. 3, I. C. C. No. 6, not supplement No. 3. The charge made by this company for the services as carrier's agent of loading and unloading live stock at the Union Stock Yards of Chicago is as follows: For loading 75 cents; for unloading 50 cents.

Mr. Cowan: The reason I am calling attention to that is that there is no lawful rate existing anywhere charging the shipper a nickel, but they are getting that 25 cents just the same, somebody. Neither tariff makes a charge against the shipper.

Mr. Hillyer: I think we would like to put those in as an exhibit, showing the 25 cents added right into the rate, $52.40."

EXCERPTS FROM TESTIMONY OF O. T. HENKLE, GENERAL MANAGER UNION STOCK YARDS & TRANSIT COMPANY, ORIGINAL EXHIBIT NO. 7, PAGES 1207 TO 1212, BOTH INCLUSIVE.

"Q. (By Mr. Winston) What is meant, Mr. Henkle, by yarding?

A. Yarding is the handling of the live stock through and about the yards after delivery is taken from the railroads, or before delivery is made to the railroads for shipping out.

Q. In other words, driving the cattle from the delivery chutes to the commission merchant's pens? A. Yes, sir.

Q. Or driving them from the pens to the chutes for loading out.

A. And taking them from the scales and caring for them.

Q. It does not include taking care of the feeding or watering of the cattle? A. No, sir.

Q. It does not include delivery from the pens to any purchasers of the cattle?

Mr. Helm: Are you getting a definition of yarding now? Mr. Winston: Sir?

The Witness: What is the last question.

Q. (By Mr. Winston) Yarding, under your definition, includes handling the cattle from the time they are delivered at the mouth of the chute pen. A. Yes.

Q. To the commission merchants pen in which they are sold.

"A. If we take them to the commission pens, yes sir.

Q. Or take them over the scales. A. Take them from the scales.

Q. From the scales to the pen of the purchaser?

A. Yes, sir, and take them from that pen to the point where they are to be shipped.

Q. And take them from that pen to the chutes for loading out. A. Yes, sir.

Q. And that is all that yarding means, is that right? A. Yes, sir.

Q. (By Mr. Helm) Is that all that you charge to yarding? Don't you charge anything for the rent or the use of the pen? A. No, sir.

Q. To anybody? A. No, sir.

Q. You just charge on the basis of the service in the labor that you perform.

A. Well, the yarding—there is a charge that we call a yardage charge, and this is the only labor that is connected with the yarding charge. Q. What?

A. This is the only labor that is connected with the yardage charge.

Mr. Winston: There are, of course, the facilities there also.

Mr. Helm: That is what I mean.

The Witness: The term "yardage" covers this service that we have defined and the use of the facilities.

Mr. Helm: That is what I was getting at. The Witness: Yes.

Q. (By Com'r Aitchison) The service that you have been describing as yarding, is that which takes 25 per cent of the time of the 29 laborers during the month of April in the shipping division.

A. Yes, they do very little yarding.

Q. They do very little yarding? A. Yes.

Q. But how does it happen that although you assign

one-fourth of the $2400 payroll to yarding you do not let any of the superintendents follow the payroll of the laborers whom they superintend, but you charge it all to loading?

A. Because the superintendent, assistant superintendent, assistant yard masters and yard masters never leave the shipping divisions. The men go at times to assist in the yarding.

Q. Then the superintendence does not extend to the yarding at all.

A. Not with those men. They would be at the scales, and under perhaps the deliverers or the counters off at the scale.

Q. And they are absolutely un-superintended?

A. No, sir.

Q. Then where is the charge of the superiors of these 29 laborers which go to yarding?

A. When they go to the scales they come under the other superintendents which are handling the yarding and weighing. Their own superintendents stay at the shipping division.

Mr. Helm: And who is in charge of these policemen?

Mr. Winston: Mr. Hunter.

Com'r Aitchison: Have you any further questions of Mr. Henkle?

Mr. Helm: Well, let him remain there. It seems a kind of a combination.

Mr. Hillyer: I have one question of Mr. Henkle.

Q. (By Mr. Hillyer) Mr. Henkle, you put in an exhibit the other day. This is the detail of that exhibit, is it not, tha ou put in the other day?

A. That is all. This is supposed to be the detail making up the figures presented yesterday.

Q. How did you describe the exhibit you put in yesterday? I may have gotten the wrong impression, but

"I would like to get how you described the exhibit you put in yesterday.

Mr. Helm: That was the direct labor cost.

A. It was headed 'Statement showing labor costs and labor cost per car for unloading and loading live stock.'

Q. (By Mr. Hillyer) We are not to understand, then, that you include in that labor cost the items chargeable to shippers for unloading live stock?

Mr. Winston: This has nothing to do with where it should be charged. This is simply the labor cost to us for performing the entire service.

The Witness: Yes, sir. I made no statement as to whom it was to be charged to, or who was responsible for it.

Q. (By Mr. Helm) Well, you publish a tariff, don't you, in which you say you make a collection as agents for the carriers for all of this business? A. Yes, sir.

Q. Is that your understanding, that this is a charge that is due you from the carriers for the service that you perform for the carriers?

A. The carriers for more than half a century paid us for it, so we concluded we were doing it for them.

Q. They paid you for it under a contract you had with them?

A. I don't know how it was originally established.

Com'r Aitchison: All that has been gone over before.

Mr. Helm: I do not know. Perhaps it has.

The Witness: It was very thoroughly developed.

Q. (By Mr. Helm) But at any rate, there was no general agreement as to changing the charges to the carriers, was there? Was there any agreement as to an increase? Has that been a subject of agreement between you and the carriers? A. No, sir.

Mr. Helm: That is all I have.

"Q. (By Mr. Hillyer) There was some agreement between you as to putting it on the freight bills, wasn't there?

A. We collect what they put on the freight bills."

EXCERPTS FROM THE TESTIMONY OF H. W. BEYERS, ASSISTANT FREIGHT TRAFFIC MANAGER, CHICAGO & NORTH WESTERN RAILROAD, ORIGINAL EXHIBIT NO. 7, PAGES 1251 TO 1253, BOTH INCLUSIVE.

"The Lowrey tariff is an agency issue, which came into existence in 1911, and was created under the direction of the Interstate Commerce Commission in so far as the—I say in so far—one reason being for an agency tariff that the Commission thought that the carriers should simplify their tariffs indicating to the shippers what rate bases would apply to or from facilities beyond the terminals of the road haul carriers.

Under the Lowrey tariff the Chicago Junction Railway is a participating carrier. The Chicago and North Western Railroad, like other road haul carriers, is an issuing carrier. The Lowrey tariff indicates the Union Stock Yards as a station on the Chicago Junction Railroad, at which are located industries, team tracks and freight houses.

In order to determine a rate on live stock to the Union Stock Yards, Chicago, there is indicated the application of rate basis No. 6. Rate Basis No. 6 advertises the application on inbound movements of the Chicago rate plus a terminal charge of $2 per car to or from industries, chutes and sidings. It also indicates that the railroads as shown will pay the Union Stock Yard & Transit Company's charges as follows: loading charges, 50 cents per car; unloading charges, 25 cents per car.

"Under this tariff the shipper has before him everything that entered into the transaction of taking a car to the chutes or sidings at the Union Stock Yards, and indicates to the shipper that his charge will be the flat Chicago rate plus $2 per car terminal charge, and that the carriers as indicated will pay the charges of the Union Stock Yard & Transit Company for loading or unloading, which was the situation up to the time that the Union Stock Yard & Transit Company changed their tariff basis by advancing it 25 cents per car, both in the matter of loading and unloading charges.

The construction of this Lowrey tariff, in so far as the rate to or from the chutes and sidings at the Union Stock Yards is concerned, was in keeping with the Chicago Junction Railway Company's tariff, of which their 22-A, I. C. C. 120, as of January 1, 1918, is typical.

In 1911, when the Lowrey tariffs were first made, the Chicago Junction Railroad was at issue with the Interstate Commerce Commission as to whether or not it was required to file its tariffs with the Commission. The question had not been decided, so we were told by the Commission that we must show specifically in our tariff what we did with respect to payments to the Chicago Junction Railway, or the Union Stock Yard and Transit Company in the matter of unloading as well as the transportation service, which the Chicago Junction Railway covered in a tariff, but that tariff not on file officially with the Commission."

EXCERPTS FROM THE TESTIMONY OF D. C. MOSIER, CHAIRMAN OF THE TRANSPORTATION COMMITTEE OF THE CHICAGO LIVE STOCK EXCHANGE, ORIGINAL EXHIBIT No. 8, PAGES 25 TO 96, BOTH INCLUSIVE.

"Q. (By Mr. Hillyer) Mr. Mosier, will you state your name, please?

A. D. C. Mosier; commission merchant; U. S. Yards, Chicago.

Q. How long have you been in the commission business?

A. I have been connected with the commission business twenty-two years.

Q. Has all that time been at the Union Stock Yards? A. Yes, sir.

Q. It would be reasonable to assume then that you are familiar with the transactions which occur at the stock yards as between the shippers and the commission men and as between the commission men and the defendants in this case? A. It would.

Mr. Woodward: Mr. Examiner, before we pass that matter in the record, my original objection, I want it understood, covers the intrastate phase of the situation; that is, the formal record would be evidence only as to interstate rate situations, and we should object, that is the Director General objects to its being considered on any intrastate phase.

Exam. Hosmer: The record will show the objection.

"Mr. Hillyer: The Director General would not make the technical point, would he, that there was any difference between a carload of live stock unloaded at the Chicago stock yards, just because it happened to come from a point on the east bank of the Mississippi River, or a point on the west bank of the Mississippi River?

Mr. Woodward: The Director General takes the position, Mr. Hillyer, that this is a lawsuit, and that that particular issue or that general issue has not been covered as to that phase of it.

Mr. Hillyer: All right. I will cover that.

What is your connection with the Exchange itself at the present time, what official position do you hold?

The Witness: I am at the present time vice president of the Chicago Live Stock Exchange and chairman of the transportation committee.

Q. (By Mr. Hillyer) Outline briefly the duties of the transportation committee of the Chicago Live Stock Exchange, of which you are chairman, and of which you have personal and direct daily cognizance.

A. The duty of that committee of that department is the filing of claims for damages and undercharges. That is to say, these claims and charges are filed for the shipper and farmer and the producer of live stock. It is also the duty of that committee to look after schedules and to see that the railroads are efficient in bringing this live stock into the yards in the best shape and in the shortest time possible, so that the shipper and farmer does not suffer a loss on account of delay of trains, and on account of incorrect or bad schedules.

Q. In other words, your activities cover all departments of the business, including traffic, the tariff, the rate situations, and the physical operation of delivering these trainloads of live stock at the yards? A. They do, yes, sir.

Q. You have been on this committee for some time,

"have you not? You have worked yourself up on it from a member to chairman of the committee? A. Yes, sir.

Q. Does this committee operate through an organization? If so, describe briefly that organization of salaried employees.

A. We have an organization under the supervision of this committee known as the transportation department of the Live Stock Exchange. It is the duty of these members to carry out the wishes and orders of the officials of the Exchange and of the transportation committee.

Q. Following your general line of testimony, please state the interests that the members of The Chicago Live Stock Exchange have in this proceeding. A. You mean this case?

Q. Yes. I will offer the witness a copy of a memorandum to refresh his memory with in order that we shall not duplicate any testimony and shall get through with it as rapidly as possible.

A. You say interest in the case. Which case do you mean, that is what I want to get at?

Q. In the case we are trying here this morning.

A. Our interest in this case is the interest of the shipper. These proceedings were brought by The Chicago Live Stock Exchange absolutely in the interest of the farmer and producer.

Mr. Andrews: Did you prepare that memorandum, Mr. Mosier?

The Witness: I helped to prepare that memorandum, yes, sir; that is, the answers.

Q. (By Mr. Andrews) All of the questions and answers?

A. Not all of them, no. I don't care for that memorandum. I can answer without it.

Mr. Andrews: I don't know what is in there, of course.

"Mr. Hillyer: We will get it in the record in proper form, and then you will know.

Q. (By Mr. Hillyer) How is live stock brought to the Chicago market with respect to freight rates?

A. Do you mean the settlement of the freight?

Q. No; how is it consigned, by whom and to whom?

A. It is consigned from the shipper at the point of origin to the commission man.

Mr. Woodward: Mr. Examiner, if this is testimony as to the practice and if it is offered in support of specific claims, the Director General objects to its admission as immaterial, in so far as it is offered for that purpose.

Mr. Hillyer: For what purpose did you say?

Mr. Woodward: Just read my statement, Mr. Satterlee.

Exam. Hosmer: Yes, just read what Mr. Woodward said there.

(Record read as above recorded.)

Mr. Hillyer: It is offered for that purpose.

Exam. Hosmer: The objection will be overruled at this time. The record will show the objection.

Mr. Woodward: May I have an exception, Mr. Examiner?

Exam. Hosmer: Yes, the record will note an exception.

Q. (By Mr. Hillyer) When the live stock is received at the Union Stock Yards, who attends to the payment of the charges thereon?

A. When this stock is received at the yards by the commission man, they pay all the charges, the yardage charges, the freight terminal charges, and remit to the shipper the net proceeds of the consignment.

Q. Are the commission men, that is like yourself, members of the Exchange, parties to this case Docket No. 12614? A. They are, each member.

Q. What are some of the duties and customs followed

"out in the relations between the farmers and the commission men with respect to the responsibility of the commission man to the farmer, and his fiduciary relationship, you might call it, to the farmer?

A. The relationship between the farmer, producer or shipper, whichever you may call him, is very close. We transact his entire business; we not only sell his live stock and take a commission, but we are his agent in every respect, in the payment of his freight, in the filing of claims both for undercharges and for damages in transit, and it is our duty to look after his interests in every way.

Q. Do you advise him as to market conditions?

A. We advise him as to market conditions daily and weekly, and the majority of the shippers and producers look upon the commission man as an advisor.

Q. Does this relationship extend to supplying the farmer with stock for fattening, and so on? Does he depend upon you to buy that for him on the market?

A. A great deal of stock is bought by the commission man on orders for the feeder of live stock, the feeder quite often not coming to the market, and depending upon the commission man to use his judgment as to price and quality and to ship him the live stock.

Q. Then as to all of this relationship, in connection with the marketing and purchase of live stock, the farmer is absent from the market and relies absolutely upon the good faith of the commission man to protect his interests?

A. In, I would say, the majority—

Mr. Woodward: Mr. Examiner, without being captious, I would like to object to that line of leading questions on this point.

Mr. Hillyer: I was simply following out the well established rule of evidence that leading questions hasten the

"testimony as long as there is no objection to them. In as much as you object to it, I will—

Mr. Woodward: Well, confine it please, as much as possible.

The Witness: I would say the majority of live stock sent to the market is not accompanied by the owner. In a great many cases, however, the shipments are accompanied by the owner. Oftentimes when they come to the market the salesman says, 'We are bid so much on your live stock. What do you think?' And they say, 'Use your own judgment. You are selling this live stock and buying for us, and use your own judgment. We have implicit confidence in your ability along that line.'

Q. (By Mr. Hillyer) How are the financial relations between the commission man and the farmer carried in due course of business there, are they carried in open accounts? That is, do you carry a running account with each farmer?

A. There are some accounts kept that way. In most cases, or a good many cases, the shipper is remitted for the net proceeds and that closes the account. But there is no shipper to this market but who can draw on his commission man for a certain amount of money if they know he is reliable. He can have an account with them, and they often do. They often come to the city and call up the commission man in buying in the downtown stores and establish their credit in the downtown store by referring to their commission man. Or they may say, 'My money has gone home. Send us out a check for so much money and I will remit it to you when I get home.'

Q. Then the farmers look to you as sort of a personal banker?

A. In many cases, yes.

Q. You have outlined somewhat in detail here this relationship between the commission man and the farmer or shipper to this market. Is this relationship generally

"recognized by everybody, including these defendants? A. It is.

Mr. Woodward: Will you read that question, please?

Exam. Hosmer: Read the question and answer, Mr. Reporter.

(Record read as above recorded.)

Mr. Woodward: I object to the latter part of it. The Witness: Shall I answer that further?

Mr. Hillyer: You might explain your answer a little more fully.

Mr. Woodward: The Director General, I might point out, is a party defendant.

Exam. Hosmer: I think it is perhaps objectionable on the ground that it is rather a conclusion as to how they recognized it.

Mr. Hillyer: I think so too, Mr. Examiner. I think I will have the witness explain what he means by that.

Exam. Hosmer: In what way do they recognize it?

The Witness: The defendants have recognized this in the settlement of claims. I have had a great deal of experience with them, and I have found out that a good many of the claim agents and a great many of the railroad people themselves will take the commission man's word. In fact, I have been called upon to decide cases which came up between shippers and claim agents, and they have recognized us and taken us as authority on these claims.

Exam. Hosmer: Were those matters of loss and damage? The Witness: Yes, sir.

Mr. Woodward: Mr. Examiner, I do not like to be too captious, but it seems to me we ought to have here a statement as to the purpose of this testimony.

Mr. Hillyer: I am perfectly willing to give you a statement.

Mr. Woodward: If there is a claim that certain individuals are entitled to reparation, the statement is direct

"that those individuals are not The Chicago Live Stock Exchange, but certain lists of shippers of record.

Mr. Hillyer: We will develop that a little later. We are leading up to that now.

Mr. Woodward: It seems to me one of the first things to show is the authority to represent those shippers.

Mr. Hillyer: I will say this, that I am not so foolish as to go into this case and ask a lot of wild questions getting nowhere. I have a definite purpose in view here in trying this case, and I think that purpose is for the interest of all parties concerned, including the Commission, the railroads, and Mr. Woodward. Now I am following that line out and doing the best I can. It may not be clear to the other gentlemen who have not studied this case as thoroughly and carefully as I have what I am doing, but I think all of these questions are right to the point, and I will get to it very shortly.

Mr. Andrews: Tell us the point, that is the quickest way to settle it.

Mr. Hillyer: If I told you the point you would lose interest. You need a little something to keep you sitting there.

Mr. Woodward: Mr. Examiner, it seems to me the authority is the first thing to put in the record. These people are claimants and the way to show authority is by the ordinary methods. There are a number of thousands of shippers claiming reparation. Now what the Director General would like to know is where is the authority on the part of these parties—

Exam. Hosmer: On the part of the commission men?

Mr. Woodward: Yes, on the part of these commission men to claim in the interests of this large number of shippers.

Mr. Hillyer: That will develop very shortly if you will just let me go ahead.

Exam. Hosmer: Go ahead. I think we can get at this

"just about as quick by the form of questions. If the testimony is not relavant and does not prove that the complainants here are entitled to reparation, that will be a matter for argument which can be decided later.

Q. (By Mr. Hillyer) Will you state the position of The Chicago Live Stock Exchange and its individual members towards the shippers and the amount of reparation which is due on the shipments involved in this case?

A. The position of The Chicago Live Stock Exchange and its individual members representing their customers, who are the shippers and producers of live stock, is that they are entitled—

Mr. Woodward: Now, Mr. Examiner, I think before this witness makes any such statement as that we are first entitled to know his authority to speak for the individual members of The Chicago Live Stock Exchange. He may be authorized to speak for the corporate entity, but he is now speaking for the individuals, which of course obviously he cannot do.

Mr. Hillyer: I will ask the witness to state whether he has full authority to speak for the Live Stock Exchange individually and as an entity.

Exam. Hosmer: He has not entered an appearance here.

Mr. Woodward: He has entered an appearance for The Chicago Live Stock Exchange, Mr. Examiner, and I have no objection to that, but when he speaks for individual members, that is a pretty wide scope.

Exam. Hosmer: Yes, he has entered an appearance for The Chicago Live Stock Exchange and he is a member and officer of it. I think he is competent.

The Witness: Where did I get with that?

(Answer read as above recorded.)

The Witness (continuing): Entitled to this reparation, and that is why the proceedings were started, and when it is collected, if it is allowed, the shipper and pro-

"ducer will get every cent. Not one dime, not one nickel, will be taken will be taken by The Chicago Live Stock Exchange or any of its members for the collection of this amount.

Q. (By Mr. Hillyer) Assuming that the money is paid over to the members of The Chicago Live Stock Exchange as factors and agents of the farmers, would the settlement with the farmers and shippers be exactly in accordance with your other transactions in the regular course of business day by day?

A. It would. If this money was remitted to the commission man as agent for the shipper, he would remit the net amount to the shipper or customer. By net amount there I mean the full reparation. There will be no charges deducted for the collection.

Q. Is there any uncertainty as to the amount of reparation due each shipper or consignor under the finding of the Commission?

A. Our books and account sales will show exactly. It is kept as a separate item and shown on the account sales, so much for the unloading charge, so much for the terminal charge, and so much for freight.

Q. That is shown separately for every item paid in this loading and unloading charge found to be unlawful?

A. It is.

Q. And it is from those records that these claims have been compiled and submitted to the Commission?

A. Those are the records from which the claims have been compiled, yes, sir.

Q. Is the testimony that you have given and are the facts involved in this reparation claim, representative of the uniform practice and custom among all of the members at the Union Stock Yards?

A. Yes. The members and practices are uniform there and are governed by rules and regulations of The Chicago Live Stock Exchange.

"Q. And do they apply uniformly in all matters of this kind?

A. Yes, sir, that is correct.

Q. Are these rules, customs and practices a matter of common knowledge around the exchange and among the people having dealings with the Exchange, including these railroads?

A. The rules and regulations are published, printed, and are common knowledge among the members of the Exchange, and any time a rule is changed it must be posted ten days and voted on before such a rule can be changed or a new rule enacted.

Q. Are these rules and regulations and customs strictly enforced in all instances? A. They are.

Q. Will you state how the reparation claims involving this loading and unloading charge, which have been filed with the Commission, and a copy of which has been served upon the railroads, were compiled in this case?

A. They were taken from the books and records of the commission houses, members of the Exchange, the actual shipments showing the actual point of origin, the car number, and a complete claim filed for each shipment.

Mr. Andrews: Do you mean by that that you have served copies of claim statements on the carriers?

Mr. Hillyer: Yes, on every road, your road as well. You have been served with a copy of a claim involving every 25 cent charge which you collected during the period when this charge was unlawful. I don't say it was served on you, Mr. Andrews, but it was served on an officer of the Santa Fe Railway.

Mr. Andrews: To whom were the claims statements sent?

Mr. Hillyer: To whom were they sent, these claims, Mr. Mosier? Did you personally attend to that, or did Mr. Park attend to that?

"The Witness: Mr. Park attended to that matter and I would rather he would answer that question.

Mr. Andrews: Who is Mr. Park? The Witness: He is traffic manager of The Chicago Live Stock Exchange.

Q. (By Mr. Hillyer) Did the Exchange through its attorney secure from the Commission the data necessary before attempting this task of compiling the claims? A. Yes, sir.

Q. Mr. Mosier, is it the sworn statement and testimony of you as a member of the Exchange, and for and on behalf of the other members of the Exchange, that the sums set out in the several claims are the correct amounts of the damage that has been suffered by reason of the unreasonable and unlawful loading and unloading charges condemned by the Commission?

Mr. Woodward: I object to that.

Exam. Hosmer: What are your grounds? Mr. Woodward: Several.

Exam. Hosmer: All right, state your grounds.

Mr. Woodward: The testimony of this witness is that the individuals entitled to the reparation are not members, some of them, at least, of The Chicago Live Stock Exchange.

Mr. Hillyer: No, you misunderstood me on that.

Mr. Woodward: Obviously all these are not members.

Mr. Hillyer: I know, but you have not studied my complaint very carefully. I have tried to tell you the purpose of the complaint, as I understand it, before the Commission is to definitely advise the parties just what the claims and contentions of the complainants amount to and what they are. Now I have tried my very best to set that out for you in the complaint, and we stand on the complaint.

Mr. Woodward: But that is not evidence, Mr. Hillyer. The complaint is an allegation and you are making the record here.

"Mr. Hillyer: Yes, but our position is stated in the complaint.

Mr. Woodward: This witness has stated that The Chicago Live Stock Exchange is not the claimant in their own right. That someone else is specifically entitled to the reparation.

Mr. Hillyer: But we have not completed that line of testimony.

Mr. Woodward: In the first place, the witness cannot answer as to the matter of damage, because that is a conclusion of law as to whether or not they were damaged.

Mr. Hillyer: Let us settle it as we go along. My question undertook to take care of that by referring to the damage found by the Commission.

Mr. Woodward: That is still a conclusion of law.

Mr. Hillyer: He is not saying that they were damaged, but he is saying if they were damaged as found in the decision of the Commission, that these statements contain the correct amount.

Mr. Woodward: I still object on the ground that it is a conclusion of law by the witness; and on the further ground that he is testifying as to matters which he has not shown are within his knowledge, by his previous testimony.

Exam. Hosmer: Now read the question.

Mr. Hillyer: Well, we think he has.

Mr. Woodward: We don't know how the freight charges were paid. They may have been paid at point of origin; they may have been paid by some third party, so far as the record shows. (Question read as above recorded.)

A. Yes, sir.

Mr. Woodward: I do not think that is a proper question, Mr. Examiner.

Exam. Hosmer: If the Commission thinks it is in-

"competent, they will disregard it. I will permit the question and answer to stand in the present form.

Mr. Woodward: I simply want to point out in passing that the witness testified that these claims were prepared from records of the complainant, that is, The Chicago Live Stock Exchange.

Mr. Hillyer: Now, did you overlook the fact that he testified a few moments back that he paid this money himself?

Mr. Stillwell: He said the commission merchants.

Mr. Hillyer: Well, he covered that.

Mr. Woodward: I was reserving that for cross-examination, as to whether he referred to the record of the Chicago Live Stock Exchange or not.

The Witness: I changed that in my answer.

Mr. Woodward: Then you referred to the records of the commission merchants? The Witness: Yes.

Mr. Woodward: So all these claims are simply transcripts of the records of certain commission merchants. Obviously it is no evidence of damage. That is only evidence of certain facts set forth. Now they speak for themselves. Those records if available might be introduced in evidence and certain deductions made from them, but this witness ought not to testify to conclusions and certainly ought not to try to draw inferences in this way.

Exam. Hosmer: Tentatively, I think the evidence may be admitted. If it is subject to the infirmities you speak of your rights are amply protected by making your objection at this time. Under our procedure I do not think it is necessary to rule further.

Mr. Woodward: I just wanted to enter the objection and take an exception.

Exam. Hosmer: Yes. That will show on the record.

"Mr. Hillyer: You refer to these statements as having been taken from the records of the commission men. What do the records of the commission men show?

Mr. Woodward: I object to that question; the best evidence of that is the records themselves.

Mr. Hillyer: All right, go ahead and answer. Shall he answer, Mr. Examiner? Exam. Hosmer: Yes.

Mr. Woodward: May I have an exception on the ground that it is hearsay evidence?

Mr. Hillyer: No, he is testifying about money that he pays out of his own pocket.

Exam. Hosmer: No, your question was broader than that.

Mr. Hillyer: All right, what do these records show? We will get to it.

The Witness: These records show the sale of the live stock, the weight of the live stock, the price they brought; they show the freight charges, the feed charges, feed charges in transit, if any, loading and unloading charge when that existed; terminal charge and any other incidental charges which may be incurred in the shipment of this live stock. This amount is paid by the commission man to the carrier or his agent, deducting his own commission, and remitting to the shipper or farmer the net proceeds of his shipment of live stock.

Mr. Stillwell: Just a moment. I object to that conclusion, paid to the railroad or its agent. I object to the words, "or its agent." There is no evidence here that the Pennsylvania Railroad ever appointed the Union Stock Yards Company as its agent and we object to it.

Exam. Hosmer: The record will show the objection.

Mr. Hillyer: Mr. Stillwell, are you familiar with the way you rendered these bills? If not, we will go into that.

"The Witness: Maybe they don't know how their statements are rendered on that stock.

Q. (By Mr. Hillyer) Mr. Mosier, supposing you received a shipment from Mr. Stillwell's line, the Pennsylvania Railroad, and you were rendered a bill for both loading and unloading charges, would that be a bill of the Pennsylvania Railroad?

Mr. Woodward: Mr. Examiner, when the attorney refers to "you," does he mean as a commission merchant?

Mr. Hillyer: Yes.

The Witness: That would be a bill from the railroad company, because it would come on that stub. I don't know whether you understand just how these come on stubs.

Q. (By Mr. Hillyer) Yes, I understand that.

A. I will say for their benefit, maybe they don't know, that they supply us with minimum weights and we insert the hoof weights less the fill allowance and figure the bill for the railroad company and then pay it.

Mr. Andrews: When you speak of the railroad company you mean the Stock Yards company furnishes you with this bill?

Mr. Hillyer: No, we don't mean that at all.

The Witness: No, we take this stub off of your bill.

Mr. Hillyer: We are answering your objection made by Mr. Stillwell, that we paid this money to the Stock Yards company and he assumed that we were assuming the Stock Yards Company was his agent. The answer of the witness is that we paid it on a bill rendered by the Pennsylvania Railroad Company. There cannot be any question about that.

Q. (By Mr. Hillyer) In connection with the statement just made by Mr. Meyers that he had not received the claims, we find here a letter signed D. L. Meyers

"dated April 4, 1921, his file 178-1710, acknowledging receipt thereof.

Mr. Meyers: That is in docket No. 9977.

Mr. Hillyer: No, that covers these shipments as well.

Mr. Meyers: The file number you give is in docket No. 9977.

Mr. Hillyer: Well, we will at this time on the record in this case say that it covers also all of the shipments, including those in this case.

Mr. Woodward: Of course, Mr. Examiner, it is immaterial whether or not it was received or sent.

At this point, Mr. Examiner, I would like to enter the appearance for the Director General of Mr. Charles D. Mahaffie.

Mr. Hillyer: If I can reserve the right to recall this witness in case I need to for further direct testimony, I will turn him over for cross-examination now to save a little time.

Exam. Hosmer: I think that is satisfactory.

Cross-Examination.

Q. (By Mr. Woodward) Mr. Mosier, as I understand it you are a commission merchant engaged in business in Chicago? A. Yes, sir.

Q. Individually, or what is your firm?

A. Rosenbaum Brothers Company.

Q. As an individual and as a member of the firm of Rosenbaum & Company, do you claim any reparation in this matter?

A. We claim this reparation for our shipper as his agent.

Q. You say 'we.' To whom do you refer by 'we'?

A. To Rosenbaum Brothers.

Q. That is Rosenbaum Brothers and you as a member of that partnership—if it is a partnership?

"A. It is a corporation.

Q. A corporation, claim reparation on behalf of your country shippers of live stock? A. Yes, sir.

Q. What authority have you for that claim?

A. In most cases I think our claim bureau representing the individual commission firms has a power of attorney from the country shipper.

Q. Now, I am speaking of certain country shippers that I presume are among this list attached as an addendum or appendix to your complaint filed February 25, 1921; what shippers among this large number have you an authorization from when this action was brought to claim this reparation on their behalf?

A. I wouldn't want to give the names because that matter was turned over to Mr. Park, manager of our transportation department.

Q. Can you refer to one shipper from whom you had that authorization?

A. I have no personal knowledge of the authorization. It didn't come under my supervision at all.

Q. You are also, as I understand it, vice president of the Chicago Live Stock Exchange? A. Yes, sir.

Q. Are these country shippers, these thousands as shown in appendix A, members of the Chicago Live Stock Exchange? A. They are not.

Q. So far as you know has the Chicago Live Stock Exchange authority or had they authority when this action was brought, and speaking now of the complaint filed February 25, 1921, to make this claim on behalf of the country shippers?

A. To my knowledge they had that authority, yes, sir.

Q. What was the nature of that authority?

A. The nature of that authority is that they are factors and agents of the shippers and not only have we

"authority, but it is our duty to look after the interests of the shipper in any respect where we think they are being defrauded or overcharged.

Q. I am speaking of the Chicago Live Stock Exchange now.

A. That is the duty of the Chicago Live Stock Exchange.

Q. You mean the members of the Exchange?

A. The members of the Exchange, yes.

Q. (By Mr. Woodward) No, I am speaking now of the Exchange itself.

A. Yes, sir, it is also the duty of the Chicago Live Stock Exchange which has the interests of the shipper to protect.

Q. Was there any written authority given by the shipper to the Chicago Live Stock Exchange to make this claim in the interests of the certain shippers shown in appendix A?

A. Before the complaint was filed? Q. Yes.

A. That part of it I would rather leave to Mr. Park.

Q. But I understand there was no written authority.

A. No written authority. Q. Nor was there a verbal contract?

A. That part of the complaint I had nothing to do with, other than to refer it to the parties that filed the complaint.

Q. Then you don't know? A. No.

Q. Was there any authority given by the country shippers to the Chicago Live Stock Exchange subsequent to the filing of the complaint on February 25, 1921, to claim on behalf of these particular individual shippers?

A. That I don't know either.

Q. And your answer is the same as an individual as it was as a member of this corporation?

A. Yes, that part of it I am not familiar with.

Q. So that your whole testimony was as to the general practice of the Chicago Live Stock Exchange, and as to the practice of the commission merchants and the members of the Chicago Live Stock Exchange?

A. And their relations to the shipper.

Q. Yes, as to their general practice.

A. General practice and the relations between the shippers and the commission men.

Q. You testified and your language was, I believe, that it was the duty of the commission agents to look after their interests in every way. Does that except the bringing of suits for personal injury of these shippers?

A. I would say with the organization we now have, if any of our shippers were injured while accompanying live stock to the Chicago market, it would be our duty to file claim for them if so requested.

Q. If so requested?

A. Yes, by the shipper; and it would be our duty to go to the shipper and say, "Have you settled this, has the railroad company settled with you?" And if he says "No, they will not do anything for me," it would be our duty to look after his interests.

Q. You would not look after his interests and bring suit in that way without his request in that specific instance, would you?

A. We would certainly go to him and ask him if he had ever received settlement, and if he had not we would go to the front for him.

Q. That is if he had made no approach to you and you simply heard of it collaterally, would you proceed in that way?

A. If this man received an injury and upon inquiry we found he had never been paid for the injury and there was a claim due him, it would certainly be our

"duty and we would investigate the matter and if necessary file claim for that shipper.

Q. But your testimony is as to this particular claim and speaking now both as a member of the Chicago Live Stock Exchange and as a commission merchant, that you had no authority, written or verbal, specially, from the particular shippers that bring this action?

A. I didn't say we didn't have.

Q. But you know of no such authority?

A. I say that is a part of the proceedings I did not take part in and I don't know what the authority was to bring it.

Q. You don't know? A. No, sir.

Q. Do all these commission merchants, members of the Chicago Live Stock Exchange, keep their books in exactly the same manner?

A. I wouldn't say exactly the same form, no. Q. You don't know?

A. Well, the accounts sales rendered are practically on the same lines, exactly, and show the same charges and items in the same way.

Q. But there may be specific variations in the particular practice?

A. There naturally would be some variation.

Q. And these claims were compiled, as I understand it, from your direct testimony, from the records of the various commission merchants? A. Yes, sir.

Q. Did you know that they were compiled from the records of your firm? A. Yes, sir.

Q. As to the records of the other commission merchants, how do you know they were compiled from them?

A. They were requested to compile them in that way.

Q. I see, but you don't know how they were actually compiled?

A. I didn't see them compiled, no, sir.

"Q. You merely know that they were requested to compile them? A. Yes, sir.

Q. Can you point to a name in this appendix A of the complaint, of a concern which ships to you?

A. I suppose I could if I went through the list, undoubtedly.

Mr. Hillyer: There is no question about it, is there?

The Witness: No question whatever.

Q. (By Mr. Woodward) That is you suppose; you don't know?

A. I know I could.

Q. Now, I will ask you to point one out. A. A. E. Lee.

Q. At what point is A. E. Lee located?

A. Centerville, South Dakota, I believe.

Q. Is he a farmer? A. He is a farmer, yes, sir.

Q. When did he ship? A. His last shipment?

Q. Yes. A. His last shipment was Monday of this week.

Q. When did he ship during the period involved in this complaint?

A. I am not able to state.

Q. You don't know that he did? A. I certainly do, yes, sir.

Q. But you don't know when? A. I don't know the exact date.

Q. Did he accompany the shipment or send a man? A. He accompanied it.

Q. Himself? A. Yes, sir.

Q. How was he paid for that shipment?

A. What do you mean by how was he paid? The proceeds were deposited in his bank to his credit.

Q. To his credit? A. Yes.

Q. As to what shipments are you referring? A. To all his shipments.

"Q. That is to say, that is the practice? A. That is the practice, yes, sir.

Q. But you don't know what happened as to any one particular shipment?

A. No, not as to any one particular shipment, no, sir.

Q. Now I will ask you to point to another shipper. A. C. Marshall.

Q. What is first name? A. Carl.

Q. Where is he located?

A. Itava, Illinois.

Q. Is he a farmer? A. He is a farmer, yes, sir.

Q. Did he ship during the period involved in this complaint? A. Yes, sir.

Q. On what dates? A. I don't know on what dates.

Q. You cannot recall the details? A. No, sir.

Q. Or can you recall as to how any particular shipment was paid? A. No, sir.

Q. I will ask you to point to another one, Mr. Mosier. These are shippers who shipped to Rosenbaum Brothers?

A. Yes, sir. Ed Holmes.

Q. Where is he located? A. Itava, Illinois.

Q. Is he a farmer? A. Yes, sir.

Q. When did he ship, during the period involved?

A. I don't know the exact date. Our records will show that.

Q. And you don't recall the details of a specific transaction? A. No, sir.

Q. How many shippers ship to you, roughly, country shippers, so-called, to your concern?

A. I should judge we have a list of around five thousand customers.

A. Five thousand customers that ship live stock consigned to you? A. Yes, sir.

Q. You, of course, don't know definitely whether that

"C. Marshall was the Marshall who shipped to you, when you picked his name out from list of several thousand?

A. I know he had live stock in here during that time.

Q. That is Claude Marshall did? A. Carl Marshall.

Q. Carl Marshall; but you don't know that he is that particular C. Marshall?

A. He might not be the one I pointed out.

Q. Where is your written authority from Carl Marshall to file this complaint? A. Mr. Park has that.

Q. But you havn't got it? A. We haven't got it. Mr. Park transacts that end of the business.

Q. You don't know that there is such authority or was such authority before the complaint was filed?

A. We know there was authority or his name would not be in the list.

Q. But that is the only way you know?

A. That is the only way I know personally, yes, sir.

Q. You deduce it. What is the interest of the Chicago Live Stock Exchange in this litigation?

A. The interest of the Chicago Live Stock Exchange is the interest of the shipper and producer.

Q. You claim, as I understood you to testify, for the shipper and producer this reparation, and that there will be no deduction to the shipper and producer?

A. That is correct.

Q. Does the shipper and producer pay the expenses of this litigation? A. No, sir.

Q. And will not pay it if reparation is awarded? A. No, sir, they will not.

Q. You made a statement, I believe, as to taking care of undercharges? A. Yes, sir.

Q. Do you always pay undercharges on shipments when they are discovered subsequent to the delivery of the shipment?

A. Subsquent? Q. Yes.

"A. Just explain what you mean, will you?

Q. You are familiar with what an undercharge is?

A. Yes, sir.

Q. An amount where the charges are collected less than the tariff amount?

A. I don't think that has anything to do with this case.

Q. But you have testified that you did—

A. We put in claims with undercharges for the shipper.

Q. You do? A. Yes, sir.

Q. Now, how about undercharges? You are speaking of overcharges, are you not?

A. When the railroads bill on us for undercharges—

Q. Yes.

A. We have endeavored in every way, and as you have the head of that department of the railroad here—

Q. No, one minute. Please read that question in order to keep the record clear.

(Question read as above recorded.)

Mr. Hillyer: Do you understand what he means by undercharges?

The Witness: You mean the shipper has been undercharged.

Q. (By Mr. Woodworth) Where the shipper has been undercharged, yes.

A. And the railroad company bills on us for the undercharge. Q. Yes. Do you pay that?

A. We endeavor in every way to collect those from the shipper for the railroad company, and we have an agreement with the railroad company that for figuring their freight, the freight that they present to us, less the fill allowance, we deduct the fill allowance, that the only place the commission man is held is for furnishing incorrect hoof weights.

"Q. Yes, but do you pay as agent for the shipper those undercharges and then take off that payment later in settlement with the shipper?

A. No, and the reason we do not is we are doing work for the railroad company; we are figuring the railroad company's bills and they are not holding us personally for those freight claims on that account.

Q. Then I understand you do not pay undercharges of that character?

A. No, because we have an agreement that covers that.

Mr. Woodward: That is all.

Q. (By Mr. Andrews) It developed in another case, Mr. Mosier, that sometimes cars are shipped in the name of the caretaker, and not the owner. A. Yes, sir.

Q. Do you know whether or not any of the persons named in appendix A were caretakers?

A. I don't know. If the stuff is billed in the caretaker's name it is always in order and the rule is in order that the proceeds go to the owner of the live stock, and naturally the owner of the live stock's name would be filled in.

Q. Do you in all cases know when a shipment is made in the name of the caretaker and not the owner?

A. In the majority of cases, yes, sir.

Q. But in some cases you don't know that?

A. I would say in all cases where the remittance is made we know. We do not remit anything to caretakers.

Q. Are shipments sometimes made in the names of several persons, or do several persons sometimes own an interest in one shipment, one or more?

A. That is sometimes the case, yes, sir.

Q. In cases like that would the names of each of those individuals be shown in appendix A?

"A. If a load of stuff was shipped by Brown and Smith, it should show Brown and Smith.

Q. Do you know whether one name of one of the joint owners or all of the joint owners' names are shown?

A. You are referring to cooperative shipments, I believe, where there is apt to be twenty owners in one shipment?

Q. Well, would all of those twenty owners appear in this list here?

A. They would not, because that is referred back to the manager of the shipping association who prorates that amount between the shippers.

Q. Will you read that answer, please?

(Answer read as above recorded)

A. Remitted back would be better than referred back.

Q. Does it frequently happen that the live stock shippers ship cars to the stock yards at Chicago to different commission men, one carload to Rosenbaum & Company and another car to another commission firm? A. That might happen, yes, sir.

Mr. Andrews: That is all.

Mr. Woodward: Just one more question, Mr. Examiner. Turning to sheet 1 of this appendix A, Mr. Mosier, there are a number of initials shown. The first one is A. A. F.; then N. B.; then A. Co., and so on down the page.

A. That is Cooperative Company.

Q. Yes, but I was referring to the initials, particularly like A. A. F. and N. B., the first two shown in the first column.. Do your records identify shippers only by such data?

A. If we could get a shipment from A. A. F., our original records might show it and then we would have

"to show in our books where remittance for A. A. F. went, and undoubtedly do.

Q. Do you know who A. A. F. might be?

A. It might be most anybody. I don't know who that A. A. F. letter was. What causes that a great many times is the railroad bills. Your agents in the country get a little tired or want to go to a ball game or something of that sort, and instead of writing A. F. Frank or A. F. Jones, they simply put in A. F. F. or A. F. J. and leave the name off, and we have to investigate to find out where that money goes.

Q. Then I understand from what you say to Mr. Andrews that the name shown as the shipper does not always represent the owner of the live stock? A. Not always.

Q. And that would be true as to certain names shown in appendix A where cooperative shipments are shown, that the association does not own the shipment, but they are owned by members of the association?

A. Yes, but each shipment is kept track of by car number, and if this reparation went into effect it would be prorated.

Q. If this reparation were awarded to you, and I mean now to the Chicago Live Stock Exchange, to whom would you pay the amounts where the names of the shippers were shown as a cooperative association?

A. We would remit it to the manager of the cooperative association who had sent in that shipment.

Q. And there are quite a number of cooperative association shipments shown here? A. Yes, naturally.

Exam. Hosmer: Any further questions on cross-examination? Anything on redirect, Mr. Hillyer?

Redirect Examination.

"Q. (By Mr. Hillyer) The names to which your attention has just been called, as I understand it, are the names of the parties who were compelled to pay these loading and unloading charges? A. Yes, sir.

Mr. Woodward: I object, Mr. Examiner; there has been no evidence to show that the witness knows anything about that. In fact, there is evidence to the contrary.

Mr. Hillyer: I will ask him if he knows that the names in that list are the names which we took off of the claims that have been filed with these defendants as names of the parties who paid these unlawful charges.

Mr. Woodward: I object. The witness has shown very conclusively that he could only identify three, as I recall.

Mr. Hillyer: No, you only asked him for three.

Mr. Woodward: At least he has not shown specific knowledge as to more than three. I don't think he could have that knowledge.

Exam. Hosmer: I think the record shows the basis for his information. If that renders him incompetent—

The Witness: If you want me to I can name a hundred.

Mr. Hillyer: Right on that point, I consider this important; if the Director General wants Mr. Mosier to sit there and go through that list of names page by page and check off those for whom he has filed claims, the complainant stands here ready and willing and offers to do it.

Mr. Woodward: Mr. Examiner, the Director General does not wish anything. He is being sued here for a large amount of money and he is insisting upon his legal rights, that complainants shall show they are entitled to money, by competent legal evidence.

"Mr. Hillyer: We are going to do that, but you said that he could point out only three of them. That is what I had in mind.

Mr. Woodward: Well, I don't say but what he could possibly point them out, but I do say his evidence does not show the specific knowledge that would entitle him to answer that question.

Exam. Hosmer: As I said before, the record shows the basis of his information, and subject to the objection the question will be answered.

Mr. Hillyer: I want to make this tender, Mr. Examiner; we are offering Mr. Mosier here as a witness for and on behalf of the Chicago Live Stock Exchange and its individual members. We can prove by him to the last detail the amount of Rosenbaum's claims for and on behalf of these shippers. Those claims have been prepared, not in the form that would make it the simplest way to present them here, namely, Rosenbaum at the top of the page and then all of the claims paid to Rosenbaum, and the reason we did not prepare it in that way was for the convenience of the railroad companies and at their request, and upon a form prepared by the Interstate Commerce Commission. That does not mean, however, that we cannot show Rosenbaum's claims if it is demanded here by the opposing side, and we propose to make a tender here and have Mr. Mosier as a typical case of a commission merchant in this reparation claim offer each and every one of his claims for reparation in this case. It will take considerable time because of the way the claims have been prepared, and the reason they were prepared in that way was for the convenience of the parties to this case and not because we wanted to prepare them in that way.

It would have been much simpler for us to put them in so we could say, 'You are the one who paid these

'claims or to whom these claims were paid, rather,' and he could say, 'Yes,' and then we could hand them in, and these railroads could check them back and forth, and there being so many railroads involved it would have taken them all of the time and expense that it has taken us to simplify this matter for them.

But we are prepared to go into all that detail and we make the tender now if the Director General takes the technical position, and we will be right here with him as long as he wants us to.

We will bring down the individual claims filed. We won't try to do that, however, before lunch, if you want to adjourn before 12:30. They are down at the stock exchange at the stock yards, but we will pick out the shipments on behalf of Rosenbaum and prove the payment of every one of these loading and unloading charges, and we here make that formal tender on this record.

Exam. Hosmer: Has counsel for defendants anything to say?

Mr. Woodward: Mr. Examiner, simply that the Director General believes there is a competent way of proving a claim for a large amount of money against the United States Government, and that the proper way is not by hearsay evidence or by ways which from the very nature of things mean that the detail cannot be checked.

While we obviously do not care to put anybody to undue inconvenience, still the complainants we submit must prove their claim by competent legal testimony. Now they are the best judge of what that evidence is.

Mr. Hillyer: Now, Mr. Woodward, will you answer this question: Are you willing to concede that we have taken a course after due consideration which is to the best interests of all parties here in checking these details you refer to? Are you willing to concede that and

"assist us along that line; or do you take the position, different from the position of the Commission and the railroads as to what was the proper way to prepare these claims, and now insist that this witness for the Rosenbaum Commission concern identify every shipment on which they paid the loading and unloading charge?

Mr. Stillwell: Can I ask one question here: Mr. Hillyer keeps saying at the request of the railroads, I would like to know what he means by that. As far as I know, none of the C. F. A. lines has requested them to prepare or assist in preparing these claims in this way.

Mr. Hillyer: Unfortunately for Mr. Stillwell, he does not have the labor of checking these claims over, but his auditor does. Now there have been auditors of these railroads who have seen this form and they said to us that this was the only way they wanted it itemized.

Mr. Stillwell: Will you give me the name of the auditor of the Pennsylvania Company who did that?

Mr. Hillyer: Our next witness will explain that in full because he personally did the whole job. It was done under his supervision.

Now in order to simplify this thing for everybody, we have gone to great labor and The Chicago Live Stock Exchange has paid out of its own pocket $13,000 in cash to prepare these claims, for which they are not going to get a cent back from the people who paid out this money. That is the care and detail with which we approached this job, and we did it to save you folks and the Commission a lot of labor and trouble. We could have brought them all in here and dumped them in here without going to this trouble, but after having gone to this trouble it does seem to be a little hard that we have to go back and do what we could have done without spending $13,000.

"Mr. Woodward: Mr. Examiner, the opportunity which the Commission affords the complainant for proving its case under the Transportation Act is by competent legal evidence. Of course I don't know the details of what Mr. Hillyer is referring to, but at this time it seems to me his attempt is to prove this claim for a large amount of money against the United States Government, and I scarcely think Mr. Hillyer can ask the Government to help him make out the complainants' case against the Government.

Mr. Hillyer: I am not asking any help from anybody. I will dump stuff on you here that will bury you alive.

I would like some expression from the Examiner as to whether he thinks we should go through with this detail, because it will mean we are going to do it.

Exam. Hosmer: The Examiner cannot bind the Commission as to what testimony it is going to consider competent, and all that, in this case. I know counsel for both sides are thoroughly conversant with the law and know what is necessary to prove reparation. I am out here to preside at this hearing and receive such evidence as is proper and competent. Now I would not undertake to say how the matter can be shortened or anything of that kind. This proceeding may go into the courts and we have got to have a record that will hold water.

Mr. Andrews: The defendants take the same position the Commission and the Administration do in that respect. We do not desire to put the complainant to unnecessary expense in preparing their case. We leave that to them to decide what is proper evidence.

Mr. Hillyer: All right. We have decided what is proper evidence, and we will take responsibility for it.

Mr. Andrews: Of course we have not had an opportunity as yet to see what Mr. Hillyer is going to offer.

"Mr. Hillyer: I will offer now as an exhibit in this case the form used in preparing these claim statements.

Mr. Woodward: Mr. Examiner, I think the exhibit is immaterial.

Mr. Hillyer: Counsel for complainant differs with you on that.

Exam. Hosmer: What is the purpose of it? It is a blank sheet of paper. I do not see the materiality of it myself.

Mr. Hillyer: We are going to offer and tender here, and these railroads have the originals, these claims made upon these forms. Of course we cannot give the railroad something we have already given them, and we cannot file with the Commission papers we have already filed with them, but the Commission told us to file them and that one copy for the Commission and one for the railroads would be enough.

Exam. Hosmer: Is that in Docket 9977?

Mr. Hillyer: Yes.

Exam. Hosmer: But as I understand it, the shipments involved in this case are separate from those involved in that case.

Mr. Hillyer: No, they are all in the same case. They are all compiled together.

Mr. Examiner, let me make this plain. It would have been almost impossible for us to have gone all over this work twice and have prepared two sets of claims. We considered it wholly unnecessary to do that, because the charge was in effect between two certain dates, and we have proved by proper testimony that those charges were excessive and unreasonable, and it would be unjustly discriminatory to refund that money to some shippers and not refund it to others. There is no necessity for separating the claims. We have separated the pleadings because of legal necessity, the passage of

"time after the trial of the first case makes that necessary.

Now to go ahead and divide these claims up is simply a question of bookkeping, and if the railroads want us to do that we offer to start doing that, but when they got those two sets of claims all they would have to do would be to add the two together and pay the balance.

Exam. Hosmer: This will be received subject to objection.

(The document was thereupon received in evidence, marked 'Complainant's Exhibit No. 1, Witness Mosier' and is forwarded herewith)

Mr. Woodward: In answer to Mr. Hillyer's observation on that point, Mr. Examiner, I should like to point out that the issue in this case is presented in his complaint in Docket 12614. We are here at this time to try the fact as to whether certain claimants are entitled to certain money. Now obviously claims that have already been filed with the carriers in no way substantiate complainant's contention at this time on that issue.

Exam. Hosmer: I don't see what bearing the filing of the claims with the carriers had, in so far as this proceeding is concerned.

Mr. Hillyer: I thought I made that clear. We put all of the claims in one list and gave them all to you people.

Your point, Mr. Woodward, as I understand it, amounts to this, that we should have prepared a claim under Docket 9977, put that in, and then we should have prepared another claim and it in the other case. We decided to put it all in at one time.

Mr. Andrews: As I understand it, you sent statements of shipments to the auditors of the defendant carriers?

Mr. Hillyer: I will ask Mr. Park to answer you. (A discussion followed off the record)

"Exam. Hosmer: This exhibit will be received in evidence at this time and marked complainant's Exhibit 1, Witness Mosier.

Mr. Andrews: I would like to make a request here that Mr. Hillyer give us the names of the officers of the railway companies to whom the lists of shipments were sent, and also a copy of the letter transmitting the statements.

Mr. Hillyer: I don't know as we will give you the letter, but we will certainly tell you who we sent that to. We will give you all we can.

Mr. Woodward: So as to anticipate certain objections on the part of the defendants, I might say the evidence Mr. Hillyer refers to would be objected to in any event without other proof than he has appeared to offer.

Exam. Hosmer: That is, the statements of claims?

Mr. Woodward: Yes, statements of claims. Now, it is evidence in support of those claims that we are after here.

Mr. Hillyer: What do you mean by evidence in support of them? Evidence that we made the shipments and that the statements were made? Are you representing all the railroads here, Mr. Andrews?

Mr. Andrews: The Western Trunk Line carriers.

Mr. Hillyer: And you make this request of yours on behalf of the Western Trunk Lines as well as the Santa Fe? Mr. Andrews: Yes, sir.

Mr. Hillyer: What was your request now? You wanted what? The names of the officers?

Mr. Woodward: The names of the officers receiving the statement, and also a copy of the letter.

(A discussion followed off the record)

Mr. Andrews: Mr. Hillyer, were all of these claims

"filed in Docket 9977, or do they include the additional shipments involved in the case we are trying here?

Mr. Hillyer: I will state again for about the fourth time, that the claims we have filed cover every shipment that moved while this unlawful charge was in effect.

Mr. Andrews: So it included claims involved in Docket 9977 as well as in this case?

Mr. Hillyer: Of course it does.

Mr. Andrews: So it included claims involved in Docket 9977 as well as in this case?

Mr. Hillyer: Of course it does.

Mr. Andrews: All right, that is all I wanted to know.

Exam. Hosmer: We will adjourn until two o'clock.

(Whereupon, at 12:30 o'clock P. M. an adjournment was taken until 2:00 o'clock P. M.)

After recess. 2:00 P. M.

Exam. Hosmer: You may proceed, Mr. Hillyer.

Redirect Examination.

D. C. MOSIER thereupon resumed the stand and testified further as follows:

Q. (By Mr. Hillyer) Referring to the question asked you by Mr. Woodward in connection with the names in this list, you identified, I think, three names at his request? A. Yes, sir.

Q. Is it your understanding that he wanted any more of them identified?

A. It is my understanding that he said that was sufficient.

Q. That was enough? A. That was enough.

Mr. Woodward: I don't recall making any such statement, Mr. Examiner.

Mr. Hillyer: If he desires, you are willing, are you

"not, to go through the entire list and identify the other shippers?

The Witness: I am willing to go through the entire list if he wants to put up with it.

Mr. Hillyer: As I understand it, the lists which Mr. Park will introduce contain also the same names, and with the shipments upon which the charges were paid?

Mr. Woodward: I object, Mr. Examiner, as irrelevant.

Exam. Hosmer: I don't see how you can refer to future evidence to be given.

Mr. Hillyer: What is the objection now?

Exam. Hosmer: You are referring to something that is not in the record at the present time. Is that your objection, Mr. Woodward?

Mr. Woodward: Yes. We could not possibly cross examine on that.

Mr. Hillyer: All right. I have a right to assume anything I want to. I will assume that Mr. Park is going to put in a list of shipments that you paid this loading and unloading charge on for your people. If he does put in such a list, have you knowledge that that list contains the names of the shippers and the identification of the shipments on which this loading and unloading charge was paid?

Mr. Woodward: I object. Exam. Hosmer: Objection sustained.

Mr. Hillyer: I based that question on an assumption. As I understand the rules of evidence a man can ask a hypothetical question on any subject he wants to. I have not based that on any actual state of facs. I have based it on an assumption.

Q. (By Mr. Hillyer) Mr. Woodward asked you about the complaints you had received and the informa-

"tion you had received from the people you say you represent. I will ask you whether or not you have received a great many complaints both verbal and written as to these loading and unloading charges.

A. Why, at the time the loading and unloading charge was put into effect we had a great many inquiries and a great many complaints that the shippers should pay in addition to all other charges a loading and unloading charge. In fact we personally had one of our biggest shippers in the west object to it very seriously.

Q. The action of the Exchange in opposing this charge was based on these complaints, was it not? A. Complaints from the shippers?

Q. Yes, complaints from the shippers? A. Yes, sir.

Q. And the charge was attacked by The Chicago Live Stock Exchange, as you have testified, as a representative of these complainant shippers? A. Yes, sir.

Q. And also on behalf of the commission men themselves as factors and agents for these shippers?

Mr. Woodward: I object to this leading line of questions, Mr. Examiner.

Q. (By Mr. Hillyer) I will ask you on what grounds you did file this complaint. State very fully the whole basis of it.

A. When this was first put into effect and we had the first notice of the 25 cent loading and unloading charge, as representatives of the shippers we took it up immediately, and at once, as the account sales went back to the country shippers, showing this 25 cent unloading or 25 cent loading charge, they immediately complained about it; and as I have before stated, one of our largest shippers, A. E. deRiqules of Denver, Colorado, one of the largest shippers to this market, objected very stren-

"uously to the loading and unloading charge, and wanted to know what action was being taken.

Q. Referring to the three shippers that Mr. Woodward asked you to identify, as representative have you filed a claim in this case on behalf of those shippers along with all of your other shippers seeking the return of this unlawful charge? A. We have.

Q. Has the Chicago Live Stock Exchange discussed this loading and unloading charge in its meetings? A. It has, yes, sir.

Q. Have the committees of The Chicago Live Stock Exchange taken notice of this?

A. They have, yes, sir, and also the board of directors.

Q. Have the complaints and the facts with relation thereto, so far as you are posted, been identical for all of the members of the exchange, in accordance with your testimony here about your own experience? A. Yes, sir.

Q. Your testimony here is offered as representative of all the members of The Chicago Live Stock Exchange?

Mr. Woodward: Mr. Examiner, I object, unless authority is shown as to all the members. He can offer it as to the Exchange, but all the members is something that he must show his authority to speak for.

Exam. Hosmer: He has testified that he is an officer of the Live Stock Exchange.

The Witness: I have testified I was chairman of the transportation committee, and it has already been brought before the board of directors.

Mr. Woodward: But, Mr. Examiner, all the members is a big order.

Mr. Hillyer: Yes, there are 101 of them.

The Witness: No, you are mistaken there, Mr. Hill-

"yer; there are more members, but that is all the firms.

Mr. Woodward: It includes all of them.

Mr. Hillyer: We offer that in good faith, that this man's testimony is representative of the collection of this 25 cent loading and unloading charge by all the members of The Chicago Live Stock Exchange in this case.

Mr. Andrews: I object. I want the Examiner to understand that these defendants do not admit that they collected this loading and unloading charge complained of in this case. Those charges were collected by the Union Stock Yards Company.

Exam. Hosmer: That has been stated. As to Mr. Woodward's objection, I think the witness is qualified, inasmuch as he represents those members and the exchange itself.

Mr. Woodward: Just for the sake of the record, may I have an exception?

Exam. Hosmer: Certainly. In other words, I think he is competent to testify as to the general practice. Of course as to the specific technical details that is another question.

Mr. Woodward: As I understand it, he was making his testimony apply to all the members individually as well as the corporate organization.

Mr. Hillyer: That is correct.

Mr. Woodward: Now I say he has not shown that he has that authority when there are admittedly over one hundred members. There is no way of cross examining them.

Mr. Hillyer: All right. I will ask you then if you are authorized by the members of The Chicago Live Stock Exchange individually and collectively to represent them at this hearing and disclose on this record

"what the custom and the practice is in connection with the payment by them of this unlawful charge?

The Witness: I am, yes, sir.

Q. (By Mr. Hillyer) Mr. Mosier, I have here your press copy book of the account sales sent to the shippers. As I understand it, *you do not* care to part with this record and put it in as an exhibit; you cannot afford to do that, can you?

A. We would rather retain that in our records.

Mr. Hillyer: In proof of these individual payments, Mr. Examiner, it will be necessary for the Commission to postpone this hearing, and as it is the rule of the Commission to set these hearings at the convenience of the shippers, I will ask to have the future hearing set at the Union Stock Yards, and that at that time Mr. Mosier and the other members of The Chicago Live Stock Exchange will read into the record in this case the proof of the payment of the unloading charge as to each shipment. We were not prepared to do that today because we did not imagine in all reason that anybody would call for it. It has been called for and we propose to give it to them. We are going to read it into the record carload by carload.

Mr. Woodward: Mr. Examiner, I would like to say, speaking for the Director General, that I have not called for anything.

Mr. Andrews: I don't recall that I called for anything.

Mr. Hillyer: You made your formal objections here to the testimony we offered in place of it. Mr. Woodward: Yes.

Mr. Hillyer: And we of course have the right to decide what we will do, and that is what we choose to do.

Mr. Woodward: That is perfectly satisfactory, but I did not call for anything.

"Mr. Hillyer: In the meantime, Mr. Examiner, I will say this, that it is the purpose of the Chicago Live Stock Exchange to send its traffic committee to Washington and interview the Director General and the chairman of the Interstate Commerce Commission and get from them a stipulation, if possible, as to what will be necessary in this case. I imagine Mr. Woodward is not in a position to enter into any stipulation with us here, and certainly his course on the record indicates that probably he would not do it, but we think probably the Director General will when he finds out the circumstances.

Mr. Woodward: Of course, Mr. Examiner, the complainants have the right to do as indicated. However, I would object to any hearing being set at the stock yards; it is bad enough to bring us out here a thousand miles without taking us to the back door of the complainant. Then in view of the fact that after traveling that thousand miles and bringing our witnesses here to testify in this case, we find they are not prepared to go on with the trial of their case and to offer legal proof, I would seriously object to us being brought to the stock yards, and I would even object to our being brought to Chicago. It seems to me that this case might be heard in Washington.

Exam. Hosmer: That will be determined by the Commission.

Mr. Hillyer: I don't believe it will be necessary for us to do anything further in this case. I believe when we make the proper presentation to the Director General, that so far as he is concerned no further hearing will be necessary.

Mr. Woodward: I think, Mr. Examiner, when the complainants prove their case the Interstate Commerce Commission will act properly.

"Exam. Hosmer: Then it is my understanding that you have no further testimony to offer today?

Mr. Hillyer: Yes, I have another witness.

Exam. Hosmer: Are there any further questions at this time in cross examination?

Recross Examination.

Q. (By Mr. Woodward) You spoke of a shipper, A. E. deRiqules of Denver. A. Yes.

Q. Objecting to the loading and unloading charge and wanting to know what action was being taken. Have you any authority from Mr. deRiqules, or had you before this case was begun to bring it for him?

A. We had a complaint from deRiqules almost immediately.

Q. That is, he complained to you about it. Did he request you, that is, The Chicago Live Stock Exchange, to bring this complaint specifically?

A. He requested us in the form of asking us what we were going to do in the matter.

Q. But he did not ask you to bring this complaint before the Interstate Commerce Commission?

A. Practically, yes.

Q. Did he in fact? A. He did not demand it.

Q. Did he request that you file a complaint with the Interstate Commerce Commission?

A. He asked us what action we were going to take, and we told him we were going to file a complaint. He was agreeable that that was the thing to do.

Q. Have you any written authority from him?

A. I may have a letter. I don't know.

Q. Before the action was taken? A. Before the action was taken.

Q. But you haven't it with you? A. I haven't it with me, no.

"Q. He did not make a specific request then before you took action, requesting that you file a complaint with the Commission?

A. He simply asked me what I was going to do, and when I told him, he agreed with that action.

Q. How many other customers of yours or country shippers of yours made this complaint to you? When I say 'you' I am speaking of your firm.

A. I couldn't say that, as to how many, but it was a case of every day, 'What are you going to do about that unloading charge? Are you going to let them put that over us, the same as you have the terminal, for years?'

Q. Can you name some others besides deRiqules? You are speaking of your firm, are you not?

A. Yes. I would not say I could name them offhand, no, but it was an every day occurrence that shippers complained about that.

Q. You spoke about being authorized by the members to make your testimony the testimony of all the members, is that a fact? A. Yes.

Q. How many members have you in The Chicago Live Stock Exchange?

A. Something over 500 members.

Q. Does every member know that this action is being brought?

A. The board of directors has that power, and the rules and by-laws of our Exchange are so that when you do testify, you testify for each and every member of the Live Stock Exchange.

Q. That may be, but that was not my question. I say, do all those 500 members know that this action was to be brought?

A. All the 500 members? Q. Yes.

A. I think without a doubt they knew it.

"Q. How did they know it? A. Because we published it and told them.

Q. It is simply your deducing from the fact that you published it, according to the rules, that they knew it?

A. That is the only way they would have to know it.

Q. Then you don't know, as a matter of fact, personally? A. Yes, I do know.

Q. That all these 500 members knew the complaint had been brought?

A. I think without a doubt they did.

Q. But you are assuming that? A. No, I am not assuming that at all.

Q. Did you go to each member? A. No, I did not.

Q. Did each member or person write to you? A. No, sir.

Q. So that you neither wrote or spoke to all the members about this specific action being begun?

A. Not personally, no. There is one thing I would like to explain here, if I may, Mr. Hillyer.

Mr. Hillyer: All right. Go ahead.

The Witness: They have stated that the stock yards company makes this collection and that they have nothing to do with it. Now I want to explain one thing to you people that you may not know about.

Mr. Andrews: We are going to explain that.

The Witness: It comes on the stub of your bill, our charges. Your lading, your minimum weight, your feeding in transit, whatever charge is incurred in transit, is put on the stub of your bill by your representative, your terminal charge, and your loading and unloading charge is put there by yourselves, and the shipper charged according to what you had on your bill.

Mr. Andrews: But what I want to get at is, you paid these charges to the stock yards company?

"The Witness: We paid the charges for the shipper based on what the railroads presented to us on the stubs of their bill.

Mr. Andrews: Yes, but you paid the money to the stock yards company?

Exam. Hosmer: That is a matter of defense.

Mr. Andrews: Yes, we are going to show that.

Mr. Hillyer: It is already in the record at great length.

Mr. Andrews: It will be in at even greater length.

Exam. Hosmer: Is that all the cross examination?

Mr. Stevenson: Might I ask a question? Exam. Hosmer: Certainly.

Q. (By Mr. Stevenson) The question was raised this morning, Mr. Mosier, concerning shipments on behalf of cooperative associations. You know, I presume, that in Illinois, and I understand a great deal of the present complaint covers shipments from Illinois points of origin—

Mr. Hillyer: Only in so far as Illinois ships here in comparison with all these other dozen or twenty live stock producing points.

Q. (By Mr. Stevenson) In any event, in the state of Illinois a great deal of land is operated by tenants for the benefit of themselves and the owners of the land on a share basis. You know that, do you not, or do you?

A. To some extent, yes, sir.

Q. In many instances the tenants are engaged in cattle raising for their benefit and the benefit of the landlord. Now, in case a shipment would come to the firm of Rosenbaum & Company from such a tenant in his own name, without the interest of the landlord being disclosed in the billing, on what basis would you handle that claim for that tenant?

Mr. Hillyer: I object to that and instruct the wit-

"ness not to answer that because that is a question that has been passed on by the Commission a good many times, and I am fully advised as to that situation and this witness is not.

Mr. Stevenson: So far as I know, you may perhaps be fully advised and you may perhaps fully advise me then, Mr. Hillyer.

Mr. Hillyer: As I understand the ruling of the courts on the question, the reparation is due the man that paid the unlawful charge, and if that shipper bore the name of John Smith or a cooperative company, who paid this unlawful charge, it is our position that the reparation has got to be paid back to him, and that you or no one else has any right to follow it any further.

Mr. Stevenson: You are in error, I think, in stating the man who paid the charge is entitled to the reparation. It is the man who bore the charge. I am speaking, Mr. Hillyer, partly, if you please, on my personal account, because I am here in the rather dual capacity of representing certain railroads, and I am incidentally a shipper of live stock from Illinois points to the Chicago market, which live stock is handled by a tenant in his name. I do not know whether that tenant has authorized Mr. Mosier or any member of The Chicago Live Stock Exchange to file a complaint on his behalf. I do know that I have a direct interest in any amount that may be repaid to that tenant because I bore one-half of such charge.

Mr. Hillyer: I might say on that point that these commission merchants are interested here as factors in this reparation the same as agents for the shippers, and the Commission has held that the factor has a right to reparation.

Mr. Andrews: Just to the contrary, Mr. Hillyer, in a decision right before me now.

"Mr. Stevenson: I have not authorized any factor or agent to make the collection of such reparation on my account.

Mr. Hillyer: You do not have to authorize the factor. He has such right of his own.

Mr. Stevenson: He has no other general authority other than the disposition and the sale of my live stock and the remittance of my share of the balance to me.

Exam. Hosmer: Let us avoid this matter of argument at this time, gentlemen.

Mr. Stevenson: I have asked the witness a question, and Mr. Hillyer has tried to prevent his answering it. I think, Mr. Examiner, this bears directly on the subject as to the authority of the commission merchant to pursue this case on behalf of certain individuals whose names probably appear—I don't know, but they probably appear in this list.

Mr. Hillyer: I did not object to your line of questioning because I do not think it is good policy to bring out anything that is worth while bringing out, but you started out here by telling this witness a good many things about the cooperative association and tenants and farmers—

Mr. Stevenson: I told him nothing about the cooperative associations.

Mr. Hillyer: (continuing)—which he did not cover at all on his direct examination, and if you want to make him your witness you go ahead and do it. He is not my witness on that subject.

Mr. Stevenson: I submit I don't have to make him my witness on that subject, Mr. Examiner.

Exam. Hosmer: No, the question was properly related to the direct examination on the question of authority.

"Mr. Hillyer: What was the original question? Let us get back to that.

(Question read as above recorded)

Mr. Hillyer: You can answer that question.

The Witness: We would consider this man was a partner and that he had a right to ask us to file a claim, he being interested and one of the partners in the production of this live stock, and if you had anything against that shipment it would be up to you to notfiy us that you were interested and you wanted the money to go to so-and-so.

Mr. Stevenson: Wouldn't you consider it necessary to secure the authority of the landlord, who was a party directly interested in the matter, before pursuing the claim?

The Witness: Not if the man who shipped the live stock was interested in it financially and if the money went back to him. We would consider him a partner and with authority to tell us to proceed with the claim.

Q. (By Mr. Stevenson) You would consider that a remittance to the tenant would completely close the account, so far as you are concerned, is that correct?

A. If he was a partner in the ownership of the live stock.

Q. You would not know whether he was or not.

A. Then we may be liable ourselves. It is up to us. If we make a misappropriation of funds then we have got to defend that appropriation ourselves.

Mr. Woodward: In all events, so far as you are concerned, the man who offers you live stock to sell owns the live stock?

The Witness: Absolutely, yes, sir.

Mr. Woodward: And when you settle with that man you have no further trouble in the matter? The Witness: No, sir."

EXCERPTS FROM THE TESTIMONY OF H. R. PARK, TRAFFIC MANAGER OF THE CHICAGO LIVE STOCK EXCHANGE, ORIGINAL EXHIBIT NO. 8, PAGES 96 TO 126, BOTH INCLUSIVE.

"Q. (By Mr. Hillyer) What is your position, Mr. Park?

A. Traffic manager of The Chicago Live Stock Exchange.

Q. What has been your traffic experience in past years?

A. For the last two years I have been connected with The Chicago Live Stock Exchange as its traffic manager. The previous eight years in industrial traffic work; the previous ten years in railroad traffic and operating work.

Q. Did you testify in Docket 9977? A. Yes, sir.

Q. Are you familiar with the physical handling of live stock into the Union Stock Yards? A. Yes, sir.

Q. Have you yourself ridden live stock trains and followed the complete transaction through from the point on the trunk lines to final delivery and unloading at the stock yards?

A. I have, yes, sir.

Q. Will you describe briefly but with some detail the physical transaction which takes place in the delivery and the unloading of live stock, and also the loading of live stock out at the Union Stock Yards?

A. These trains are handled into the stock yards in solid train load lots by the trunk line or road haul carrier engine, and also the road haul crews, being switched into a long chute capable of unloading forty to fifty cars at a time. The cars are set in at the unloading chutes, and unloading men working for the Union Stock Yards & Transit Company start at each end of the train and unload these forty or fifty car trains in from a minute to

"a minute and a half per car. The cars are then pulled out in solid trains of empties and go back for additional loads. Is that the explanation you wish?

Q. Yes, that is it. Now please give in a similar manner the transaction which takes place in the payment of these charges, including freight charges and the unloading charge, and so forth.

A. The conductor in charge of the train into the unloading chutes has the waybills on each and every car in that train. These waybills are turned over by the railroad conductor to the man at the unloading chutes who conveys them to the joint agent, Mr. E. L. Kemp. Q. Joint agent of whom?

A. Joint agent of the different railroads centering at the stock yards, and he makes some checks and then sends the waybill stub on each individual car to the individual consignee or commission merchant for information as to the correct weights upon which freight charges are to be assessed.

The commission man places upon this waybill stub the correct weight, and the waybill is then returned to Mr. Kemp who conducts some further clerical work in connection with this waybill, and it is then turned over by him to the Union Stock Yards & Transit Company, who submits to the commission merchant twice a week a statement of all of the charges due from that commission merchant, the commission firm paying to the Union Stock Yards & Transit Company said freight charges, which in the cases involved in this hearing included the unloading charge of 25 cents per car.

Is that what you wanted?

Q. Yes. Are the members of The Chicago Live Stock Exchange shown as parties to the transportation record in all of these cases? A. They are, yes, sir.

"Mr. Woodward: Mr. Examiner, I do not think that question is clear.

Mr. Hillyer: It is my purpose to make it clear.

Mr. Woodward: A party to the transportation record would be either a consignee or consignor, would it not?

The Witness: Well, the members are the individual commission houses.

Mr. Woodward: That is assuming all of the commission men are members of The Chicago Live Stock Exchange.

The Witness: All of the commission men involved in this case are members of The Chicago Live Stock Exchange.

Mr. Woodward: But that was not the question. It assumed that all the commission men were members of The Chicago Live Stock Exchange. That has not been shown.

Q. (By Mr. Hillyer) I will ask you if they are. A. They are.

Q. Are you a member of The Chicago Live Stock Exchange? A. I am.

Q. That is also true of outbound shipments, is it not, that the members of The Chicago Live Stock Exchange are parties to the transportation record when these shipments move outbound? A. That is a fact.

Q. And your testimony as to the unloading charge applies as well to the loading charge? A. Yes, sir.

Q. Now will you explain a little more in detail the transaction as to the outbound shipment?

A. The outbound shipment is largely similar to the inbound shipment, in that the railroad company simply sticks a bunch of empties into the loading chutes and there the reverse operation is performed. The animals are run into the cars and it requires a trifle longer time

"to load, but very little, and then the cars are sealed up and started on their way eastward, as a rule, in solid trainloads, or wherever they may be destined.

Q. About the payment of the loading charge, how is that done?

A. That all depends on the manner in which the freight charges are paid, Mr. Hillyer. If they are prepaid the commission merchants at the Union Stock Yards pays all of the charges, including the 25 cent loading charge. If they are paid at destination, the consignee pays the charges including the loading charge.

Q. As I understand it, there is quite a movement of fatted stock to the packers in the east? They buy this stock on the exchange and they attend to the handling of their own shipments eastbound? A. That is a fact.

Q. Are they members of The Chicago Live Stock Exchange or are they represented by members of The Chicago Live Stock Exchange?

A. In some cases they are represented by the members of the Live Stock Exchange, and to the extent that they are represented, they are involved in this case; and to the extent that they are not represented they are not involved in our complaint.

Mr. Woodward: May I inquire what the packers refers to?

Mr. Hillyer: I distinguish between the packers who consume these shipments of live stock as against the commission merchants who do not butcher live stock themselves.

Q. (By Mr. Hillyer) Now with respect to these outbound claims on loading charges, those claims have been handled by the packers themselves, have they? A. So I understand.

Q. Except, I think, we have some claims for the Cudahy Packing Company.

"A. And we have some claims for the smaller packers where the shipments were purchased on the Chicago market by members of our Exchange or parties of record in this case.

Q. Mr. Park, what have you to say as to the authority of the Exchange through its organization and through the members of the Exchange to pursue this claim for reparation?

A. Mr. Hillyer, we have powers of attorney for all the shippers upon all of the shipments upon which we have filed claims.

Q. Have they given you instructions to pursue this matter with the Commission?

A. Yes, I have almost had to hire an extra man to take care of the complaints for them, because they have not received the return of the money involved in this case.

Q. Is your office the office where all of these transactions in connection with the Interstate Commerce Commission claims center?

A. Yes, and it is the office that is looked to by all the farmers and shippers for reimbursement for overcharges and loss and damage and reparation claims under this case.

Q. And is it looked to by the officers of the railroads who have matters coming under that general description? A. Yes, sir.

Q. Do you have personal and direct relations with the officers of the railroads on all of these questions? A. Yes, sir.

Q. Will you describe the preparation of these claims that have been presented, showing the individual shipments, reading into the record the information that is given as to each shipment, and I will ask you to state also the officers of the railroads upon whom you served

"these claims, and also state what you did in the way of filing these claims with the Interstate Commerce Commission; and also state whether or not these claims cover all of the shipments that moved during the entire period when this charge was assessed, which shipments are involved in Docket 9977 and in Docket 12614?

Mr. Woodward: Mr. Examiner, first of all I would like to inquire the purpose of this question. There are certain papers referred to as claims. I understand the claims are set forth in the complaint with the Appendix A. Any additional papers and data in regard to those claims would have to be presented here in the testimony, and I might as well make the objection in the beginning in order to avoid detailed objection, that that would be hearsay evidence and would not be admissible to prove, in an action to recover money, we will say, the facts, because they are hearsay, and are objected to.

Now the testimony—and perhaps I anticipate on this—is in the nature of hearsay evidence, and in so far as it is of that nature I give notice that I shall and am obliged to object to its admission.

Mr. Hillyer: All right. Read the question.

(Question read as above recorded)

Mr. Woodward: Further, Mr. Examiner—

Mr. Hillyer: Just a moment. I thought you had finished your objection. Mr. Woodward: Not entirely.

Mr. Hillyer: I will have to have him read the question over again then.

Mr. Woodward: Further, Mr. Examiner, whether these names are filed with the carriers or not is absolutely immaterial, and upon whom they are served is absolutely immaterial.

Mr. Hillyer: Isn't that a matter of argument? Mr. Woodward: This is a matter of objection to certain specific testimony offered.

"Mr. Hillyer: All right, you have the objection; now we will have the answer.

Exam. Hosmer: This Docket 9977, is it your intention to read into the record the details of those shipments?

Mr. Hillyer: No, we are not going to put into the record the detail of those shipments at this time. My question was of a more general character than that. Suppose I ask him each question separately?

Exam. Hosmer: I think that would be better.

The Witness: I have it written down here, Mr. Hillyer.

Mr. Hillyer: Have you prepared a list of shipments of live stock to the Chicago market upon which shipments the loading charge condemned in Docket 9977 was assessed? The Witness: I have.

Q. (By Mr. Hillyer) What did you do in preparation for preparing those statements, in order to find out what information would be necessary?

Mr. Woodward: Objected to as immaterial.

Exam. Hosmer: The objection will be overruled for the present.

The Witness: I took the matter up with you and you furnished me advice that you had secured from the Interstate Commerce Commission to furnish the proof in a certain form.

Mr. Woodward: I ask that the statement of the witness be stricken from the record.

Mr. Hillyer: Now will you take a copy of that, Mr. Park, and read the heading into the record?

Mr. Woodward: Mr. Examiner, that is hearsay evidence as to a statement of what the Interstate Commerce Commission did.

Exam. Hosmer: Anyway, I do not think it is very material. As to this particular document that you are about

"to read the headings of, that is a copy of your Exhibit No. 1 which you submitted this morning, is it not?

Mr. Hillyer: That is true.

Exam. Hosmer: Then there is no necessity for reading it into the record.

Mr. Hillyer: No, it is already in the record.

Q. (By Mr. Hillyer) Describe in detail how you filled out these schedules and prepared these statements?

A. Before I made up these claims I talked to the accounting officers of the several railroads.

Q. Name the railroads.

A. Mr. Frank Main of the Rock Island.

Q. What is he on the Rock Island? A. Auditor.

Q. Mr. Frank Main, auditor of the Rock Island Railroad.

A. Yes, sir. I also talked to the auditor of the C. M. & St. P., I don't remember his name; and I talked to two or three other subordinate men in the accounting departments of railroads, and from my conversation, while it—

Mr. Woodward: Now, Mr. Examiner, I object. There is no opportunity to cross examine these gentlemen on this hearsay testimony.

Mr. Hillyer: The Commission does not enforce any strict rule of hearsay. If they did the railroads would never get any testimony in in these cases.

Exam. Hosmer: The objection will be overruled for the reason before noted in the record.

The Witness (continuing): And I learned that the most expeditious manner of making out these claims was to make them out against each railroad separately, making each railroad's claim separate for each individual month, aggregating each month's business, in so far as the unloading and loading charge was thus illegally assessed, and show the interest thereon, and show the shipments in absolutely chronological or date order.

"The claims were thus made up. This makes it possible for each individual railroad company to very easily check or verify the car numbers of shipments and the correctness of the amount charged in so far as the unloading or loading is concerned.

These statements after they were prepared, why we sent one copy of each individual claim to the Interstate Commerce Commission last February. One other copy was sent to each individual railroad with the possible exception of a few small lines that have not to date been entered, but all of the western and all of the big lines have been filed with the traffic official in charge of reparation claims. There is such a gentleman on each line and in each instance it was filed with him after I ascertained his name.

Q. (By Mr. Hillyer) In getting this information that you placed upon these statements, what records did you take it from?

A. From the records of the commission firms and the stock yards Company.

Q. If you had prepared these claims as for each commission man instead of preparing them the way the auditors of the railroads asked you to prepare them—

Mr. Woodward: I object.

Q. (By Mr. Hillyer—continuing)—what would have been the practical result of each railroad trying to check its proportion of several hundred claims?

Mr. Woodward: I object to that question, Mr. Examiner, because there is no evidence that the auditors of the railroads requested them to do it in that way.

Mr. Stillwell: I don't see what difference it makes if it was done this way.

Mr. Hillyer: You folks are not trying this case for me. I am trying it the best way I can, and I prefer to continue in my own way.

"The Witness: My answer is bedlam.

Mr. Woodward: May I have an exception noted on the record, Mr. Examiner? Exam. Hosmer: Yes.

Q. (By Mr. Hillyer) Explain in detail how each railroad would have to check its portion of these several hundred claims instead of having one claim presented to it?

A. I don't know how it could do it.

Q. It could not possibly do it, could it? A. No, sir.

Mr. Andrews: I object to this testimony, Mr. Examiner.

Mr. Hillyer: It has already been objected to four times. Mr. Andrews: I am going to object again.

Mr. Hillyer: All right, make it unanimous.

Mr. Andrews: It doesn't make any difference what claims have been filed with the railroad companies. It is just a backhanded method of stinging the railroad corporations.

Mr. Hillyer: I object to that remark, Mr. Examiner. That is not a proper statement.

Exam. Hosmer: Have you finished your statement? Mr. Andrews: That is all I have to say.

Exam. Hosmer: I do not think this statement would have any bearing on the liability of the railroad. It may be permissible in showing why this form here was drawn up. I don't see the materiality of it, but if Mr. Hillyer desires to put it in in that form I will permit him to show that.

The Witness: Mr. Examiner, I most bitterly resent the insulting remarks made by the railroad attorney here with reference to backhanded attacks. I don't think I should be subjected to any such thing as that.

Mr. Hillyer: We want that to show on the record, Mr. Examiner.

The Witness: Yes, I want that on the record. I want

"the Examiner to understand that I resent any such low down stuff as that.

Exam. Hosmer: I don't think it was meant for you personally.

Mr. Hillyer: I don't know who it was meant for. If it was not meant for him, it was meant for me, and I resent it just as much as he does, and I want that on the record.

The Witness: I have been in many such cases and I have never been subjected to any such statement before.

(A discussion followed off the record)

Mr. Andrews: Mr. Examiner, that was not intended as any personal reflection on either Mr. Park or Mr. Hillyer. I was merely trying to enter an objection.

Q. (By Mr. Hillyer) Will you take a bunch of those claims there and in some detail, taking the representative statements, just show how the claims were made up.

A. For instance, I have before me a statement against the Santa Fe. This includes all the claims against the Santa Fe, and it starts out with the car which had assessed against it the unlawful 25 cents unloading charge. That is car 54,809, Atchison, Topeka & Santa Fe, which was delivered at the Union Stock Yards June 29, 1917, originating at Cardy, Missouri, consigned by Agren Brothers to Messrs. Swiney Brothers Company, Union Stock Yards, Chicago. In addition to the regular freight charges collected from Swiney Brothers on this shipment, there was a 25 cent so-called unabsorbed unloading charge.

Q. Is Swiney a member of the Chicago Live Stock Exchange? A. Yes, sir.

Mr. Woodward: To make that specific, Mr. Examiner, I am again objecting to this evidence as hearsay

"evidence and not competent legal evidence to support the claim.

The Witness: I might say that Messrs. Agren Brothers asked me to file this claim. They furnished me a power of attorney and instructed me to recover at the earliest possible moment the amount involved. If that is not competent legal testimony, I don't know what is.

Exam. Hosmer: There is no need to argue the question. The objection will be noted.

Q. (By Mr. Hillyer) Now will you state if the example you gave of the claim on that carload for that unloading charge is representative of the items shown on all of these claims that you have prepared and filed in this case?

A. Yes, sir, that is the fact.

Q. The packages on the table over there (indicating) contain the third copy or the copy which you retained for yourself, of each one of these claims? A. Yes, sir.

Mr. Woodward: I object to that statement, Mr. Examiner. That is obviously improper examination.

Exam. Hosmer: He can tell what is in the package.

Mr. Woodward: But how can we cross-examine him on what is in the package?

Mr. Hillyer: We are going to give you a chance.

Mr. Woodward: The whole point is that it is not in evidence.

Mr. Hillyer: We will offer these packages in evidence at this time. They are the only copies we have left of these claims, and you have a copy of them.

Mr. Woodward: I object to his offering this in evidence, on the ground of its being hearsay and not competent legal testimony.

Exam. Hosmer: Just a moment; these are your office copies of these claims?

"Mr. Hillyer: Yes.

Exam. Hosmer: And I understand two copies of the originals of each are in the files of the Commission?

Mr. Hillyer: Yes, sir, and another copy of them, as just presented, has been served upon the proper officers of these defendants?

A. On each one of them. Q. Yes.

A. And the Director General as well. Q. Yes, they all have them.

Mr. Woodward: I have no knowledge of that service. It may or may not be so, but nevertheless I would not consider that that would mitigate the hearsay character of the testimony.

Exam. Hosmer: It is your purpose to introduce these into this record at the present time?

Mr. Hillyer: We offer them as exhibits here if you want additional copies. The Commission has copies in Washington, and I have a letter from the Commission saying it will be only necessary for us to prepare two copies, one for the Commission and one for the defendant. We prepared a third copy for ourselves, and this is the third copy. If we offer this copy in this hearing the Commission will then have two copies and I presume we can get one of them back.

Exam. Hosmer: I was going to say I see no necessity for formally putting this in the record here, inasmuch as it is in the files of the Commission at Washington. I want to shorten this hearing as much as possible and give everybody a chance to make their objections as to the probative value of this evidence, and I think that can be done without very much difficulty by simply stating what this is and where the copies are and for what purpose they are offered at this time, and then let the record show the objections for each side and let it go into the record in that way.

"Mr. Woodward: I object to that on the ground of hearsay.

Mr. Hillyer: We offer these statements at this time for the purposes of the record in this case as the statements of the shipments involved in this case on which reparation is claimed by the complainants in this case; and tender is made of these statements for use at this trial for the cross-examination, by the gentlemen on the other side, if they want them for that purpose or for any other purpose for which they can be used here. If the Commission wants to take them, I would say that they are at liberty to do so. We will ask the Commission, however, to let us have one of the two copies that they themselves have.

Mr. Woodward: My point is that this is a formal hearing at which the complainants had opportunity to prove their claims. Those claims were put in issue by the complainant. Now these extraneous matters filed somewhere else have nothing to do with this hearing.

Mr. Hillyer: They are here; they are filed right here in Docket No. 12614.

Mr. Woodward: I prefer not to be interrupted in my statement. The only thing is that the claimants should produce competent legal evidence at this hearing. When incompetent evidence is offered we will object to it.

Exam. Hosmer: That is your privilege, but I thought that to shorten this up he could simply allude to these and identify them as the same records now in the files of the Commission and then let Mr. Hillyer state for what purpose he offers them, and when he has finished his statement let counsel for the carriers make their objection on whatever ground they see fit. That is simply to avoid any necessity of formally putting these documents in the record now and duplicating records we already have.

"Now, was that the end of your statement, Mr. Hillyer?

Mr. Hillyer: Yes, we tender the whole business here as a part of the record in this case.

Exam. Hosmer: But you state that they are true copies of documents which are already a part of the files of the Commission and which has been served on the representatives of the defendants in this case?

Mr. Hillyer: Yes.

Exam. Hosmer: Now have you finished your objection, Mr. Woodward?

Mr. Woodward: They are objected to, of course, on two grounds, Mr. Examiner. In the first place, as hearsay evidence; in the second place as immaterial.

Mr. Hillyer: To satisfy one of those grounds we will ask the Commission at the further hearing in this case to issue a subpoena upon these defendants to bring in the originals, in which these claims were made. That will take care of that. We will get the very best evidence then in the record, the original documents.

Exam. Hosmer: I understand that these are segregated by dates so that those which relate particularly to this case can be taken out and that they will not overlap with the shipments in document No. 9977?

Mr. Hillyer: If they are in chronological order as Mr. Park testified, that is true. Did you take the claims down to a certain date and then the balance of them will show shipments of a later date; is that true, Mr. Park? Look at one of them and see.

The Witness: Yes, your statement is correct.

Mr. Woodward: Mr. Examiner, I do not think perhaps I am understood as to the hearsay character of this testimony. It is not that these are copies of some other paper, but the original paper itself is hearsay evidence

"and consequently the copy would be in even more degree hearsay evidence.

Mr. Hillyer: I understand perfectly your point, but you have the originals and I am going to ask the Commission to issue a subpoena on you to bring them in here at the further hearing in this case.

Mr. Woodward: Mr. Hillyer still does not understand my point; those originals are hearsay evidence, Mr. Examiner. These copies of course can be nothing less than hearsay, because if the originals were hearsay they would be hearsay.

Mr. Hillyer. With the reservation, Mr. Examiner, of the right of complainants at a later date to produce the commission men in detail, all of them, so as to identify the portion of the charges that each one of them paid on these shipments, I am through with this witness.

Exam. Hosmer: Cross examine.

Cross-Examination.

Q. (By Mr. Stillwell) Mr. Park, do I understand these documents you have before you are taken from the books of the commission men?

A. And in some instances from the stock yards records.

Q. That is what I thought. I was not quite sure on that. That is all I have.

Q. (By Mr. Woodward) Mr. Park, being copies of other records which are in existence, the original papers which you referred to as filed with the Commission and the carriers, they were also copies of those records, were they not?

A. I don't understand your question. What record do you consider original, and then I will understand you?

"Do you consider the way bill the original record?

Q. Unfortunately I am not on the stand, but these were taken, were they not, from records—

Mr. Hillyer: If you do not understand the question, of course you cannot answer it.

The Witness: These were taken from the original waybills of the railroad companies.

Q. (By Mr. Woodward) And of other records? What other records?

A. And in part from other records. But these were taken from the original waybills of the railroad companies.

Q. That is, they were taken from other records? A. Railroad records.

Q. And the statements filed with the Commission and carriers are compilations taken from other records?

A. From the original waybills and railroad records.

Q. And they were not a reproduction of any one particular record?

A. They were of the original waybills.

Q. But they do not represent a reproduction of those original waybills; they are compilations?

A. They were made by me and under my direct supervision from the original waybills.

Q. But they contain other data than the data shown in the waybills? A. No, sir, I had the original.

Q. Yes, but they contain other data than that shown in the waybills, do they not? A. Well, they show interest.

Q. Then the interest shown is something additional? A. Oh, yes.

Mr. Woodward: So, of course, Mr. Examiner, they are simply hearsay.

Exam. Hosmer: The objection will show on the record.

"Mr. Hillyer: We are going to give you some original records before you get through.

Exam. Hosmer: Any further cross-examination? Any redirect?

Mr. Hillyer: No.

Mr. Woodward: Mr. Park, you mentioned having powers of attorney, I believe. A. Yes, sir.

Q. (By Mr. Woodward) Have you them with you? A. No, sir.

Q. From whom have you powers of attorney? A. The shippers.

Q. By whom, who are they? A. All of the shippers involved in these claims.

Q. You say you haven't the powers of attorney present?

A. No, I have not.

Q. When did you receive that power of attorney?

A. Some of them before the original hearing in May, 1919, and the rest subsequent to that time.

Q. In what form are they?

A. A little statement to the effect that—

Q. No. I mean are they written? A. Yes, they are written.

Q. In writing? A. Yes.

Mr. Woodward: I object, Mr. Examiner, to the evidence of the witness as to the contents in his direct testimony of these powers of attorney unless the written documents are in evidence. That is all.

Exam. Hosmer: The record will show the objection.

Q. (By Mr. Hillyer) I think I ask you on direct examination about the method employed by the Stock Yards Company for the collection of freight charges, including the loading and unloading charges. Will you explain a little more in detail how this charge is col-

"lected and whether on shipments of live stock there is a freight bill rendered as is customary on other freight?

A. There is no freight bill furnished the Commission firm showing the payment by the commission firm of freight charges. This is due to the tremendous amount of business transacted each week in the yards, there being often a million dollars in freight charges paid to Mr. Kemp, and such a tremendous amount of business being transacted that it is almost impossible for the joint agent to furnish the consignees freight receipts. Instead of that there is a statement that I can best explain in this manner: That the waybills and the waybill stubs coming to Mr. Kemp's office are there checked as I explained before, and the stub is sent to the commission firm for information as to the weight of the animals, the commission firm placing upon said waybill stubs the correct weight and also at that time taking a record of the amount of the freight charges to be collected. The waybill stub is returned to Mr. Kemp, who does some more auditing in taking records and such as that, and then send the stub to the Union Stock Yards & Transit Company auditor, Mr. Chase. Mr. Chase's office makes up a statement reading to the commission firm, as for instance the caption Rosenbaum Brothers and the date, and then in the lower left hand corner it shows the railroad hauling the shipment in, then shows the pro number, the identifying number and then the car number and initial and then the consignor, that is the shipper, and then the gross amount of freight charges. The commission firm attaches its check to that statement and returns it to the Union Stock Yards & Transit Company, and that ends the transaction so far as the commission firm is concerned.

The thing I want to get clear in the record and in the minds of you folks is that there is no receipt fur-

"nished the commission firm. He has nothing tangible in any way, shape, form or manner to show that he has paid these freight charges to the railroad or the Stock Yards company, so that if it is such a document Mr. Woodward has been speaking about, it is not in existence, so far as the commission firm knows, because there is no such receipt ever furnished them.

Does that explain it, Mr. Hillyer?

Q. Yes. I will ask you this question: You are familiar with the preparation of reparation claims under rule 5 of the Commission, are you not? A. Yes, sir.

Q. And that in the preparation of such a claim it is customary to attach to the claim the paid freight bills? A. Yes, sir.

Q. And that is received by the Commission as prima facie the original evidence of the payment of the charges therein named? A. Yes, sir.

Q. And while the Commission later on requires the auditor of the rairoad to sign this claim showing the railroad did receive this money, the original evidence of the payment is this receipted freight bill? A. Yes, sir.

Q. Which is in the possession of the man who paid the freight? A. Yes, sir.

Q. Now, as to the shipments of live stock, due to the great volume of the business and the rapidity with which it must be handled, this local custom has grown up of paying the freight charges without any freight bill? A. That is a fact.

Q. Therefore the only document in existence showing the amount—

Mr. Woodward: I object, Mr. Examiner, as a leading question.

"Q. (By Mr. Hillyer — continuing) — of the freight charge would be what? I will change the form of the question. The only document in existence taking the place of the freight bill would be what?

A. The statement furnished the commission firm by the Stock Yards company and returned by the commission firm to the Stock Yards company with the commission firm's check for the amount thereof.

Q. By statement do you mean these individual stubs? Are they not returned attached with the check too? A. No.

Q. Just the statement? It is a statement?

A. Yes, sir, a statement in form as I have read it into the record.

Q. Where are those records at the present time? A. Where are they?

Q. Yes, those original records. A. I understand they are in the possession of the Stock Yards company.

Q. At any rate they are in the possession of some of these defendants?

A. The railroads or their agents.

Mr. Hillyer: Mr. Examiner, in order to complete the record on that, we will ask in the proper way for the Commission to issue a subpoena duces tecum on these defendants to produce these original documents, showing the payment of the freight money, they being the only ones that have them.

Exam. Hosmer: Any cross-examination?

Mr. Andrews: No questions."

EXCERPTS FROM THE TESTIMONY OF JOHN HUBLY, A FARMER AND STOCK MAN, OF MASON CITY, ILLINOIS, ORIGINAL EXHIBIT NO. 8, PAGES 126 TO 134, BOTH INCLUSIVE.

"Q. (By Mr. Hillyer) Where do you live, Mr. Hubly?

A. Mason City, Illinois.

Q. What business are you engaged in? A. Farmer and Stock man.

Q. Do you make shipments of live stock to the Chicago market? A. Yes, sir.

Q. Are you a comparatively large shipper? A. I think so, yes, sir.

Q. How many shipments would you make here in the course of a year? A. From 50 to 75.

Q. Carloads? A. Carload lots.

Q. Did you hear the testimony of Mr. Mosier as to the relation between the farmers and the commission men who represent them on the market here?

A. I heard the testimony this morning. I haven't heard any testimony this afternoon.

Q. I mean the testimony this morning. A. Yes, sir.

Q. You heard him testify as to the relationship of the commission man as factor and agent of the farmer and shipper of live stock? Did you hear that testimony? A. Yes, sir.

Q. Does that statement correctly state your relationship to the commission man who handles your business?

A. As far as I know, it does, yes, sir.

Q. During the time this loading and unloading charge was put upon the shipments to this market, did you protest to your commission representatives this increase in your freight charges? A. Yes, sir, I did.

"Q. And did you authorize your commission man to take every step possible to stop this collection of this charge and to have the charge voided as an unlawful charge? A. Yes, sir.

Q. And to secure for you on your behalf—

Mr. Woodward: I object to the leading form of these questions, Mr. Examiner. They have gone along quite a while.

Exam. Hosmer: Yes, Mr. Hillyer, I will have to ask you—

Q. (By Mr. Hillyer) I will change the form of the question. What did you do in seeking to secure the recovery of this money through your commission man?

A. I asked my commission man to get me a rebate of the 25 cents per car loading and unloading charge.

Mr. Hillyer: That is all.

Exam. Hosmer: Cross-examine.

Cross-Examination.

Q. (By Mr. Woodward) Mr. Hubly, when were you aware that this action was brought before the Interstate Commerce Commission, first? A. When was I aware?

Q. Yes. A. I couldn't tell you the exact date.

Q. Within the last month? A. Six or eight weeks ago.

Q. You knew six or eight weeks ago that this action was being brought before the Commission?

A. Before the Commission in Washington, yes, sir.

Q: So you did not specifically authorize your commission man to bring this suit with the Interstate Commerce Commission?

A. I authorized him to bring this complaint. I couldn't say who it was before.

"Q. But you did not know of this action before the Commission until six or eight weeks age?

A. I didn't know before of this action here, no.

Q. You live at Mason City, Illinois?

A. Yes, sir.

Q. And you are a large shipper, I understand, of live stock, shipping from fifty to seventy-five cars a year?

A. Yes, sir.

Q. Are you a farmer? A. Yes, sir.

Q. Do you raise this live stock yourself? A. Part of it.

Q. How about the rest? A. Ship it in, feed it, and ship it out.

Q. Do you buy that stock which you ship in? A. Yes, sir.

Q. Is all the stock which is shipped yours? A. Yes, sir.

Q. How many shipments did you make during the period involved in this complaint?

A. I couldn't tell you offhand without my record.

Q. How were you paid for these shipments here, or what is the practice of paying the money by commission men?

A. Why, the money was deposited for my account in my home bank.

Q. As I understand you took your stock, two or three cars together sometimes, sometimes one car, and you loaded it yourself?

A. Yes, sir, and shipped it to Chicago.

Q. You load it at Mason City, Illinois? A. Part of it.

Q. Where do you load the other part of it? A. Hubly, Illinois.

Q. And you ship that stock to Chicago? And the

"consignee is some commission man here in Chicago? A. Yes, sir.

Q. What is the name of that commission man?

A. Bowles Brothers Commission Company.

Q. They sell that for you on the Chicago market? A. Yes, sir.

Q. After they sell it they remit to you certain cash, do they not? A. Certain amounts, yes, sir.

Q. Do they give you a statement with each shipment? A. Yes, sir.

Q. A separate statement for each shipment? A. Yes, sir.

Q. Do you carry a running account with them? A. No, sir.

Q. What does that statement show?

A. It shows the number of cattle shipped, the date shipped, where they are shipped from, who they are shipped from, number of cattle, the weight, price per pound, the freight charges and the feed charges and insurance, and the commission charges. I believe that is all I can recall right now. After that is deducted it shows the net.

Q. You are familiar with the prices of cattle? A. Yes, sir.

Q. The price of cattle during the years 1918 and 1919 were higher than they have been for several years, were they not? A. Yes, sir.

Q. Fifty per cent higher than they were in 1916? A. Yes.

Q. And 1916 was still higher than 1915? A. Yes, sir.

Q. That is all.

Exam. Hosmer: Anything further, Mr. Hillyer?

Mr. Hillyer: That is all we have to offer at this time; or I will ask this witness, have you in your pocket an invoice of shipments that you have shipped here that you can introduce?

"A. I have, yes, sir.

Q. (By Mr. Hillyer) Offer it here, please. I think it explains what Mr. Woodward had in mind.

Exam. Hosmer: Do you tender this in evidence? Mr. Hillyer: Yes, sir.

Mr. Woodward: This, I understand, is a copy, Mr. Examiner, of some other document.

Exam. Hosmer: It is an invoice, is it not?

Mr. Hillyer: I don't know whether your understanding is correct or not. I have examined it carefully. It is just the statement that comes in due course of business.

Mr. Woodward: I will have to object to this, Mr. Examiner, on the very good ground of it being secondary evidence when primary evidence is available; in other words, it is hearsay. It shows on its face that it is a copy.

Mr. Hillyer: Who has the original of it?

The Witness: I have the original and that is a copy the commission firm keeps. The commission firm keeps a copy of every bill of sale rendered to a shipper.

Mr. Hillyer: I will ask you to withdraw that and send to me in a few days the original of it.

The Witness: Yes, I have the original of it at home.

Exam. Hosmer: Furnish that in ten days.

Mr. Andrews: What road is Mason City, Illinois, on?

The Witness: Illinois Central and Chicago & Alton.

Q. (By Mr. Andrews) Are all of the shipments upon which you are claiming reparation in this case state shipments? A. Yes, sir.

Q. They moved over state roads and routes to Chicago? A. Yes, sir."

PAGE TAKEN FROM ORIGINAL EXHIBIT No. 37.

Reparation in The Chicago Live Stock Exchange Loading and Unloading Case

Claim of The Chicago Live Stock Exchange under Decision in Docket No. 1118.

Destination, Union Stock Yards, Chicago, Illinois.

D J 19338 · C. M. & St. P. Jan. 1, 1919. · Sheet #4

Date of Delivery	CAR		WAYBILL		Originating Station	Consignor	Consignee	Route	Commodity	Reparation Claimed (in cents)	Interest at 6% (in cents)
	Initial	Number	No	Date							
12/28	St P	100313	42	12/27	La Motte	J B Ludwig	A Burnett	St P	hogs	25	02
12/30	U P	46525	41	12/28	Linden	G E Care	W Mahoney	"	"	25	02
12/31	M K T	49523	72	12/30	Clayton	H C Bothmier	V N Lawler	"	"	25	02
12/30	R I	170149	80	12/29	Ridgway	Am Coop As	L Spencer	"	"	25	02
"	St P	2739	79	"	"	"	"	"	"	25	02
"	"	90437	116	"	No English	A. G. & Ballard	Bracl L S	"	"	25	02
"	"	35656	33	"	Cambridge	Inglis B	"	"	"	25	02
12/29	U P	36801	230	12/28	Waukon	Waterville E. C	L Spencer	"	"	25	02
12/30	PKCNW	16991	164	"	Decorah	Am. Coop Ass	"	"	"	25	02
"	P S	100417	83	12/29	New Hampton	Chichasm Eq.	"	"	"	25	02
"	St P	56698	259	12/28	Lynnville	J A Williams	Wood B	"	sheep	25	02
"	St P	9679	257	"	"	Roy Williams	"	"	"	25	02
"	"	67759	258	"	"	"	"	"	"	25	02
"	"	90343	....	.....	Rosbrook	A Vanderschel	Rappal B	"	"	25	02
"	C G W	6593	54	12/29	Parnell	R G Shnill	Miller W W	"	"	25	02
"	St P	90131	53	"	"	"	"	"	"	25	02
"	U P	37493	43	12/28	Linden	C K Thombury	W R Smith	"	"	25	02
"	St L S X	2184	74	"	Dexter	F M Pollard	Wood B	"	cattle	25	02
"	St L W	8105	75	"	"	"	"	"	"	25	02
"	St P	101024	42	"	Matawan	J Mc Ardle	"	"	"	25	02
"	M St L	37009	41	"	"	"	"	"	"	25	02
"	TNO	61966	43	"	"	"	"	"	"	25	02
12/31	St P	751	272	12/29	Fairmont	R C Hunt	Pritchard	"	"	25	02
"	C N W	4989	89	12/28	Mapleton	T B Taylor	Natl L S	"	"	25	02
12/30	R I	500322	119	"	Houston	J J Sliter	Hefner C	"	"	25	02
"	CStPMO	25573	27	"	Huntley	E C Mauss	Rappal	"	"	25	02
12/29	R I	500202	145	"	Preston	Preston Sp. Ass.	Stand. L. S.	"	"	25	02
"	St P	11351	102	"	Spring Grove	G P Armston	L Spencer	"	"	25	02
12/30	Soo	29447	29	"	Hokah	Hok Sp. Ass	A Piatt	"	hog	25	02
"	I G N	8173	30	"	"	"	"	"	"	25	02
"	Pa	660034	219	"	Wells, M	T R Markey	Rappal	"	"	25	02
12/29	R I	74008	142	"	Caledonia	Peoples Coop	Conklin	"	"	25	02
"	"	500140	141	"	"	P Schiltz	"	"	"	25	02
"	"	100217	104	"	Spring Grove	Spg. Gr. Assn	"	"	mix	25	02
"	B4	20206	63	"	Canton	F Wichert	Bunker & S	"	hogs	25	02
12/30	N W	614	34	"	Prosper	L A Knowlton	"	"	"	25	02
"	St P	89063	15	"	Dakota	O Vier	Stand. L S	"	"	25	02
12/28	R I	76349	82	12/27	Harmony	Far. Shpg Ass	L Spencer	"	"	25	02
12/29	Q	68203	103	12/28	Spring Grove	G P Arnston	"	"	"	25	02
"	"	63650	102	12/26	Houston	Far. Ass	Stand. L S	"	"	25	02
									Total.....	10.00	.80

EXCERPT FROM EXHIBIT No. 1, PAGE 19, TARIFF ON LIVE STOCK OF THE UNION STOCK YARD & TRANSIT COMPANY, I. C. C. No. 2 ISSUED APRIL 16, 1917, EFFECTIVE MAY 21, 1917:

"The charge made by this Company for the service (as a Carrier's Agent) of loading and unloading Live Stock at the Union Stock Yards, of Chicago, Ill., is as follows:

'For loading 75 cents per car of any capacity.
For unloading 50 cents " " " " " "'"

EXCERPTS FROM EXHIBIT No. 1, PAGES 29 TO 37, BOTH INCLUSIVE, L. A. LOWREY'S TARIFF No. 20-J, I. C. C. No. 37, NAMING LOCAL AND JOINT TERMINAL CHARGES, RULES AND REGULATIONS FROM OR TO POINTS WITHIN THE CHICAGO DISTRICT.

Index No.	STATION.	TERMINAL CARRIER.	FACILITIES.	ISSUING CARRIERS. A.T.&S.F.	B.&O.	B.&O.C.T.	C.&O.of Ind.	C.&A.	C.&E.I.	C.&E.	C.&N.W.	C.B.&Q.	C.G.W.	C.I.&L.	C.M.&St.P.	C.R.I.&P.
				RATE BASES. (For explanation, see pages 70 to 74, incl.)												
899	*STONY ISLAND.....ILL.	N. Y. C. & St. L.....	Industries.....	1	1	1	1	1	1	1	1	1	1	1	1	1
			Freight Houses....	2	...	...	...	2	2	...	2	2	2	2	2	2
901	*SUMMERDALE.....ILL.	C. & N. W.....	(34)Industries.....	1	1	1	1	1	1	1	4	1	1	1	1	1
			(34)Team Tracks....	1	1	1	1	1	1	1	4	1	1	1	1	1
			(34)Freight Houses...	2	2	...	2	2	2	2	4	2	2	2	2	2
903	*SUMMIT.....ILL.	C. & A.....	Industries.....	1	1	1	1	4	1	1	1	1	1	1	1	1
			Team Tracks.....	1	1	1	1	4	...	1	1	...	1	1	1	1
			Freight Houses....	...	2	...	2	4	2	2	2	...	...	2	2	2
905	*TRACY.....ILL.	C. R. I. & P.....	Industries.....	1	1	1	1	1	1	1	1	1	1	1	1	4
			Team Tracks.....	1	1	1	1	1	1	1	1	1	1	1	1	4
907	*TRACY AVE.....ILL.	B. & O. C. T.....	Industries.....	1	1	4	1	1	1	1	1	1	1	1	1	1
			Team Tracks.....	1	1	4	1	1	1	1	1	1	1	1	1	1
909	*UNION STOCK YARDS.ILL.	C. J.....	Industries.....	6	6	6	6	6	6	6	6	6	6	6	6	6
			Team Tracks.....	6	6	6	6	6	6	6	6	6	6	6	6	6
			(1)Freight Houses...	6	6	...	6	6	6	6	6	6	6	6	6	6
911	*WASHINGTON HEIGHTS.....ILL.	C. R. I. & P.....	Industries.....	1	1	1	1	1	1	1	1	1	1	1	1	4
			Team Tracks.....	1	1	1	1	1	1	1	1	1	1	1	1	4
			Freight Houses....	...	2	...	2	2	2	2	2	2	2	2	2	4
913		P. C. C. & St. L.....	Industries.....	1	1	1	1	1	1	1	1	1	1	1	1	1
			Team Tracks.....	1	...	1	...	(3)1	(3)1	...	1	1	1	...	1	1
			Freight Houses....	2	2	...	2	2	2	2	2	2	2	2	2	2
915	*WEBER.....ILL.	C. & N. W.....	(3)Industries.....	1	1	1	1	1	1	1	4	1	1	1	1	1
917		C. & W. R.....	(3)(9)Industries.....	1	1	1	1	1	1	1	(47)5	1	1	1	1	1
			(3)(9)Team Tracks...	1	1	1	1	1	1	1	(47)5	1	1	1	1	1
921	*WEST HAMMOND....ILL. (Calumet Park.)	I. H. Belt.....	Industries.....	1	1	1	1	1	1	1	1	1	1	1	1	1
			Team Tracks.....	1	1	1	1	1	1	1	1	1	1	1	1	1
923	*WEST HAMMOND....ILL.	M. C.....	Industries.....	1	1	1	1	1	1	1	1	1	1	1	1	1
			Team Tracks.....	1	...	1	...	1	1	...	1	1	1	...	1	1
924		B. & O. C. T.....	Industries.....	1	1	4	1	1	1	1	1	1	1	1	1	1
925		C. W. P. & S.....	Industries.....	1	1	1	1	1	1	1	1	1	1	1	1	1
			Team Tracks.....	1	1	1	1	1	1	1	1	1	1	1	1	1
			Freight Houses....	2	2	...	2	2	2	2	2	2	2	2	2	2
927		C. C. C. & St. L.....	Industries.....	...	...	...	...	...	...	...	...	...	...	...	...	...
			Team Tracks.....	...	...	...	...	...	...	...	...	...	...	...	...	...
			Freight Houses....	...	...	...	...	...	...	...	...	...	...	...	...	...
929	*WEST PULLMAN.....ILL.	I. C.....	Industries.....	1	1	1	1	1	1	1	1	1	1	1	1	1
			Team Tracks.....	1	1	1	1	1	1	1	1	1	1	1	1	1
			Freight Houses....	2	2	...	2	2	2	2	2	2	2	2	2	2
931		P. C. C. & St. L.....	Industries.....	1	1	1	1	1	1	1	1	1	1	1	1	1
			Team Tracks.....	1	...	1	...	(3)1	(3)1	...	1	1	1	...	1	1
			Freight Houses....	2	2	...	2	2	2	2	2	2	2	2	2	2
933	*WEST 22D ST.....	Belt.....	Industries.....	1	1	1	1	1	1	1	1	1	1	1	1	1
			Team Tracks.....	1	1	1	1	1	1	1	1	1	1	1	1	1

(47)Trap cars (see Rule 34) will be subject to minimum weights, minimum charges, and plus charges specified in Rate Basis No. 1.

For application of rates, explanation of abbreviations, notes, other reference marks, rules or regulations and exceptions to application of rates, refer to pages 6 to 26, inclusive.

RATE BASIS—Continued

Rate Basis No.	FROM OR TO FACILITIES WITHIN THE CHICAGO DISTRICT. (As named on pages 28 to 69, incl.)	TRAFFIC IN	APPLY
4	Industries	Carloads Trap Cars (see Rule 5), subject to minimum weights, minimum charges and plus charges specified in Rate Basis No. 1	Chicago, Ill., rates, unless specific rates are published in tariffs lawfully on file with the Interstate Commerce Commission or State Commissions.
	Team Tracks	Carloads	
	Freight Houses	Carloads Trap Cars (see Rule 5), subject to minimum weights, minimum charges and plus charges specified in Rate Basis No. 1 Less than Carloads	
5	Apply Chicago, Ill., rates.		

BASIS FOR RATES TO AND FROM FACILITIES OF THE CHICAGO JUNCTION RAILWAY.

Rate Basis No.	TO OR FROM THE FOLLOWING CARRIERS.	FREIGHT TRAFFIC (Except Live Stock.)		LIVE STOCK FROM OR TO (as noted) INDUSTRIES, CHUTES AND SIDINGS.						CARRIERS AS SHOWN WILL PAY THE UNION STOCK YARDS & TRANSIT CO.'S CHARGES AS FOLLOWS:		
		CARLOAD AND TRAP CARS.	LESS THAN CARLOAD. From Freight Houses Index Nos. 221, 223 and 909. (Out-bound only.)	CARLOADS.				LESS THAN CARLOADS. (See note below)		LOADING CHARGES.	UNLOADING CHARGES.	WEIGHING CHARGES.
				Out-bound.		In-bound.						
				Apply.		Apply.		Apply.				In Cents Per Car.
		Apply Rate Basis No.	Apply Rate Basis No.	Rate Basis No.	Plus.	Rate Basis No.	Plus.	Rate Basis No.	Plus.	In Cents Per Car.	In Cents Per Car.	Out-bound.
	A.T.& S.F.	1	2	5	(18)$2.00	5	(18)$2.00	5	(18)$2.00	50	25	
	(28)B.& O.	1	2	5		5	$1.00	5	$3.00	50	25	10
	B.& O.C.T.	1		5						50	25	10
	C.& O. of Ind.	1	2	5		5	$1.00	5	$3.00	50	25	10
	C.& A.	1	2	5	(18)$2.00	5	(18)$2.00	5	(18)$2.00	50	25	
	C.& E.I.	1	2	(20)5	(18)$2.00	(20)5	(18)$2.00	(20)5	(18)$2.00	50	25	
				(19)5		(19)5	$1.00	(19)5	$3.00	50	25	
	(28)C.& E.	1	2	5		5	$1.00	5	$3.00	50	25	10
	C.& N.W.	1	2	5	(18)$2.00	5	(18)$2.00	5	(18)$2.00	50	25	
	C.B.& Q.	1	2	5	(18)$2.00	5	(18)$2.00	5	(18)$2.00	50	25	
	C.C.C.& St.L.	1	2	5		5	$1.00	5	$3.00	50	25	10
	C.G.W.	1	2	5	(18)$2.00	5	(18)$2.00	5	(18)$2.00	50	25	
	C.I.	1	2	5		5	$1.00	5	$3.00	50	25	10
	C.M.& St.P.	1	2	5	(18)$2.00	5	(18)$2.00	5	(18)$2.00	50	25	
6	C.R.I.& P.	1	2	5	(18)$2.00	5	(18)$2.00	5	(18)$2.00	50	25	
	C.T.H.& S.E.	1	2	(22)5	(18)$2.00	(22)5	(18)$2.00	(22)5	(18)$2.00	50	25	
				(21)5		(21)5	$1.00	(21)5	$3.00	50	25	10
	(28)G.T.	1	2	5		5	$1.00	5	$3.00	50	25	10
	I.C.	1	2	(16)5	(18)$2.00	(16)5	(18)$2.00	(16)5	(18)$2.00	50	25	
				(17)5		(17)5	$1.00	(17)5	$3.00	50	25	10
	I.H. Belt	1	2	5		5	$1.00			50	25	10
	(28)M.C.	1	2	5		5	$1.00	5	$3.00	50	25	10
	M.St.P.&S.S.M.	1	2	5	(18)$2.00	5	(18)$2.00	5	(18)$2.00	50	25	
	(28)N.Y.C.	1	2	5		5	$1.00	5	$3.00	50	25	10
				(16)5	(18)$2.00	(16)5	(18)$2.00	5	(18)$2.00	50	25	
	(28)N.Y.C.&St.L.	1	2	5		5	$1.00	5	$3.00	50	25	10
	(28)Penna. Co.	1	2	5		5	$1.00	5	$3.00	50	25	10
	(28)P.M.	1	2	5		5	$1.00	5	$3.00	50	25	10
	(28)P.C.C.& St.L.	1	2	5		5	$1.00	5	$3.00	50	25	10
	(28)Wabash	1	2	(16)5	(18)$2.00	(16)5	(18)$2.00	(16)5	(18)$2.00	50	25	
				(17)5		(17)5	$1.00	(17)5	$3.00	50	25	10

NOTE.—On L. C. L. shipments of horses and mules for delivery at express chutes of the C. J. Ry., Rate Basis mentioned will only apply when the revenue to the road haul carrier equals or exceeds $15.00 per shipment plus the established L. C. L. arbitraries and in instances where charges are less than $15.00 per shipment freight charges will be advanced to $15.00 plus the established L. C. L. arbitraries.

For application of rates, explanation of abbreviations, notes, reference marks, rules and regulations and exceptions to application of rates, refer to pages 6 to 26, inclusive.

EXCERPT FROM TESTIMONY OF H. W. BEYERS, ASSISTANT FREIGHT TRAFFIC MANAGER, CHICAGO & NORTH WESTERN RAILROAD, EXHIBIT NO. 7, PAGES 1249, AND 1252.

Page 1249:

"Q. (By Mr. Norton.) The second question relates to the tariff situation, about which the Commission wants information, and which has not been touched by the complainants or interveners, and I want you to answer that particularly with reference to the Chicago Junction Railway Company and its situation in this matter.

A. I think I can explain the tariff situation briefly and to the point by taking Chicago & North Western tariffs as typical. The plan of the carriers throughout is the same.

The Chicago & North Western I. C. C. 7698, as of June 5, 1916, still in effect; also I. C. C. 7713, as of September 20, 1915, still in effect; these tariffs name rates on live stock between various stations, including rates from Illinois, Wisconsin, Michigan, Iowa, Minnesota, North and South Dakota, and from the Missouri River to Chicago. These tariffs clearly stipulate that the rates named therein apply only on shipments loaded or delivered on Chicago and North Western Railway tracks, or on shipments received from or delivered to connecting lines, and that for the rate basis applicable from or to points located on connecting lines within the Chicago district see Lowrey's I. C. C. No. 32, supplements thereto and reissues thereof."

Page 1252:

"Under the Lowrey tariff the Chicago Junction Railway is a participating carrier. The Chicago and North Western Railroad, like other road haul carriers, is an issuing carrier. The Lowrey tariff indicates the Union Stock Yards as a station on the Chicago Junction Railroad, at which are located industries, team tracks and freight houses.

In order to determine a rate on live stock to the Union Stock Yards, Chicago, there is indicated the application of rate basis No. 6. Rate Basis No. 6 advertises the application on inbound movements of the Chicago rate plus a terminal charge of $2 per car to or from industries, chutes and sidings. It

also indicates that the railroads as shown will pay the Union Stock Yard & Transit Company's charges as follows: loading charges, 50 cents per car; unloading charges 25 cents per car.

Under this tariff the shipper has before him everything that entered into the transaction of taking a car to the chutes or sidings at the Union Stock Yards, and indicates to the shipper that his charge will be the flat Chicago rate plus $2 per car terminal charge, and that the carriers as indicated will pay the charges of the Union Stock Yard & Transit Company for loading or unloading, which was the situation up to the time that the Union Stock Yard & Transit Company changed their tariff basis by advancing it 25 cents per car, both in the matter of loading and unloading charges."

EXCERPT FROM EXHIBIT 1, UNNUMBERED PAGE BETWEEN PAGES 69 AND 70 ENTITLED RULES AND SPECIAL INSTRUCTIONS, OFFICIAL CLASSIFICATION No. 44:

"Unless otherwise provided when property is transported subject to the provisions of the Official Classification, the acceptance and use are required, respectively, of the 'Uniform Bill of Lading,' 'Straight' or 'Order', * * * 'Export Bill of Lading,' * * * 'Uniform Live Stock Contract' * * *."

EXCERPT FROM EXHIBIT 1, PAGE 72, OFFICIAL CLASSIFICATION No. 44:

"SEC. 5. The shipper at his own risk and expense shall load and unload said live stock, * * *".

EXCERPT FROM EXHIBIT 1, PAGE 76, OFFICIAL CLASSIFICATION No. 44:

"8. It should be understood in receiving Live Stock of any description for transportation, that the actual delivery does not commence until the stock has been placed in the car, and the responsibility of the Railroad Company shall cease upon the delivery of the car at the station to which it is consigned. The consignor and the consignee are responsible for the loading and unloading of the same, the carrier assuming no liability whatever in regard to such loading and unloading."

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, FREDERICK G. CAMPBELL, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages numbered from 1 to 172 inclusive, contain a true copy of the following:

Excerpts from original exhibit No. 6,
pages 10 to 38, both inclusive,
pages 316 to 341, both inclusive,
pages 472 to 476, both inclusive,
pages 496 to 498, both inclusive,
pages 504 to 512, both inclusive,
pages 535 to 539, both inclusive,
pages 542 to 544, both inclusive,
pages 571 to 583, both inclusive;

Excerpts from original exhibit No. 7,
page 861,
pages 890 to 892, both inclusive,
pages 975 to 979, both inclusive,
pages 1027 to 1032, both inclusive;
pages 1207 to 1212, both inclusive;
pages 1251 to 1253, both inclusive;

Excerpts from original exhibit No. 8,
pages 25 to 96, both inclusive,
pages 96 to 126, both inclusive,
pages 126 to 134, both inclusive;

Excerpt consisting of one page from original exhibit No. 37,

Excerpts from exhibit No. 1,
page 19,
page 35,
page 37;

Excerpts from exhibit No. 7,
page 1249,
page 1252;

Excerpts from exhibit No. 1,
Unnumbered page appearing between 69 and 70,
page 72,
page 76;

In the case of
George J. Adams and A. W. Kitchen, Copartners Trading as Adams & Kitchen, *et al.*,
Appellants,
vs.
Andrew W. Mellon, Director General of Railroads, etc., *et al.*,
Appellees,

October Term, 1930.
No. 4462.

which said original exhibits from which these excerpts were taken were certified to this court from the District Court of the United States for the Northern District of Illinois, Eastern Division, and which said original exhibits are certified to the Supreme Court of the United States under two separate certificates, pursuant to order of this court entered on the fourth day of November, 1931.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this sixteenth day of December, A. D. 1931.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

FILE COPY

FILED
FEB 24 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,
Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,
Respondents.

PETITIONERS' BRIEF ON THE MERITS.

FRANKLIN J. STRANSKY,
CLAIR R. HILLYER,
JAMES P. CAREY, JR.,
Counsel for Petitioners,
230 South Clark St.,
Chicago, Illinois.

SMITHROP-BARNES PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

PAGE

I. Opinions of the Courts below 1

II. Jurisdiction 1

III. Statement of the Case 2-16

IV. Specification of Errors 17-18

V. Summary of Argument:

I. The underlying proposition involved is that this is an action in tort brought against respondents as joint tort feasors on account of the exaction from petitioners of unlawful and unauthorized charges by the means of an unlawful practice resorted to by respondents in order to settle a controversy between themselves with reference to such unauthorized charge. This practice was unreasonable and unlawful because (1) the published tariffs of the line-haul carriers undertook the complete transportation of live stock to the Union Stock Yards at Chicago for a through rate or charge contemplating complete transportation, including unloading, and the rights of the shipper growing out of such published tariffs cannot be disturbed or increased except by a change made in the published tariffs of the line-haul carriers in accordance with paragraph 3 of Section 6 of the Act; (2) said extra unauthorized charge was not authorized either by the published tariffs of the line-haul carriers or by the published tariffs of the Stock Yard Company; (3) the Stock Yard Company, in performing the unloading service, acted as a mere agency or instrumentality of the line-haul carriers; (4) under the particular facts and circumstances in this case the exaction from petitioners through the joint action and cooperation

of the line-haul carriers and the Stock Yard Company was a wrongful and tortious act which rendered respondents jointly and severally liable to make reparation regardless of which of them in the first instance collected the unlawful charge, and regardless of which of them benefited pecuniarily thereby..... 19

II. The Circuit Court of Appeals should have accepted as conclusive the finding of the Commission based upon sufficient evidence and involving a purely administrative matter, to the effect that the practice resorted to by respondents to exact from petitioners the extra charge of 25 cents per car was an unreasonable and unlawful practice. The practice condemned was not that of setting up in published tariffs a separate terminal charge covering the unloading service. We concede this might have been done by the line-haul carriers. The decision of the Circuit Court of Appeals establishes the precedent that a line-haul carrier who has for 50 years assumed the entire burden of the expense connected with the performance of a terminal service, and who has continuously performed such service through the instrumentality of an agent, may lawfully, without changing its published tariffs, unite with the agency performing the terminal service in a practice whereby there is exacted from the shipper an additional charge over and above the through rate specified in the published tariffs of the line-haul carrier. Although the question as to whether the increased charges of the Stock Yard Company were unreasonable from the standpoint of their being excessive is wholly immaterial in this case, we have never admitted that such charges were reasonable in amount. The question as to whether the line-haul carriers should have absorbed the

increased charges of the Stock Yard Company not involved, inasmuch as the Commission, after it had declared the charge unlawful, was not required to go further and investigate whether the amount thereof was reasonable. The conclusion of the Circuit Court of Appeals that the Stock Yard Company in effect collected the controversial charge from the shipper or consignee, and that such circumstance absolved both the Stock Yard Company and the line-haul carriers from liability, is unsound for the reason that the practice condemned was that of the line-haul carriers and the Stock Yard Company uniting in an unlawful practice which rendered them jointly and severally liable to make reparation, regardless of which of them actually collected the money. The exaction complained of was brought about by the joint action of respondents acting in concert for the material advantage and benefit of each. It is the intent of the Act to Regulate Commerce to require carriers to proceed in the publication of their tariffs and in the collection of their published tariffs and charges in an open, direct and straight-forward manner, without resorting to subterfuges and indirect methods to obviate a compliance with the law..... 21

III. The outstanding question in this case is whether or not, during the period covered by the reparation order, it was the duty of the line-haul carriers under their published tariffs, construed in the light of the particular custom, usage, facts and circumstances in this case, to unload live stock at the Union Stock Yards, Chicago. Whether the determination of that question was purely one of law, or whether it was dependent upon the incidental determination by the Commission of certain underlying facts, the decision

of the Circuit Court of Appeals was clearly wrong and without judicial precedent. The determination of the question of whether it was the duty of the line-haul carriers to unload live stock at the Union Stock Yards is a matter committed to the decision of the administrative body, the Interstate Commerce Commission, which in each instance is required to fix reasonable rates and establish reasonable practices. The question of whether or not it was the duty of the line-haul carriers to unload live stock at the Union Stock Yards was a question of fact to be determined according to the actual conditions or operations at that point. Obviously, no rate for the transportation of live stock could be intelligently considered or approved or disapproved by the Commission unless it was first determined by the Commission whether the obligation to unload live stock at the Union Stock Yards was on the shipper or the line-haul carrier. The Commission is vested with the power and authority not only of determining whether a particular rate is reasonable, but also of determining the question as to whether any practice of the carrier which gives rise to the application of a rate is reasonable or lawful. (*Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477; *Los Angeles Switching Case*, 234 U. S. 294; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247.) The determination of whether it was the duty of the line-haul carriers to unload live stock consigned to petitioners at the Union Stock Yards in Chicago was dependent upon the determination of many questions purely of fact, including the history of the unloading charge, the established custom and usage at the Stock Yards with reference thereto, the relationship between the line-haul carriers and the Stock Yard Company, the

particular conditions existing at the Union Stock Yards, and the question as to whether the so-called unloading charge in fact covered other services for the exclusive benefit of the line-haul carriers. The finding of the Commission on that question should therefore have been accepted by the Circuit Court of Appeals. (*Standard Oil Co.* v. *United States*, 283 U. S. 235.) On the other hand, if the question of the duty to unload live stock at Union Stock Yards was purely a question of law, the conclusion of the Circuit Court of Appeals on that question was erroneous. It is clearly shown by the decision of this court in the case of *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, and the case of *United States* v. *Union Stock Yard*, 226 U. S. 286. Our view in this respect is also sustained by the courts generally. The Act to Regulate Commerce did not abrogate the performance by the carrier of any duty which at common law it owed the shipper or the public. Since the duty of unloading live stock is an indispensable part of the transportation of the same, it was the duty of the line-haul carrier, whether it chose to provide its own facilities for unloading live stock or to select an independent corporate entity to perform that service as its agent or instrumentality, to provide either in its line-haul rates or in a separate terminal charge for the complete transportation of live stock, including the unloading. It was the nature and character of the service performed which was controlling. Since the line-haul carriers in their published tariffs held themselves out to perform the entire transportation service for through rates and charges covering the terminal service, the fact that the terminal carrier was itself an interstate common carrier subject to the provisions of the

Act was wholly immaterial. But even if in this case it had not been the absolute common law or statutory duty of the line-haul carriers to unload live stock consigned to the Union Stock Yards in Chicago, when the line-haul carriers in their published tariffs held themselves out to perform the complete transportation service, including the unloading of live stock, and provided definite through rates and charges and a definite terminal charge to the Union Stock Yards covering compensation to themselves for the unloading service, such entire duty and all of its responsibilities became that of the line-haul carriers. The fact that the line-haul rates to Chicago, plus the charge of $2.00 for terminal or switching service constituted the through charge and included delivery of live stock to the consignee at the Stock Yards, is clearly established by the finding of the Commission (R. 144). Such fact is also admitted in the opinion of the Circuit Court of Appeals (R. 398). The line-haul rates to the Union Stock Yards in Chicago and the $2.00 per car terminal charge, except as said line-haul rates were horizontally raised, are the identical line-haul rates and terminal charge involved in *Interstate Commerce Commission* v. *Chicago, B. & Q. R. Co.*, 186 U. S. 320, and in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98. In both of these cases it appears that the line-haul rates and the terminal charge included compensation to the line-haul carriers for the unloading of live stock at the Union Stock Yards. Such fact is also uncontradictedly established by the testimony of the traffic expert called on behalf of the line-haul carriers at the hearing before the Commission. Paragraph 3 of Section 1, Paragraph 7 of Section 6, and Paragraph 3 of Section 6 of the Act to Regulate Com-

merce clearly indicate that where a line-haul carrier in its published tariffs undertakes to transport property between different points on its own route and points on the route of some other carrier, and publishes a through charge for the performance of that duty, any change which affects or disrupts the right of the shipper must be shown by a corresponding change in the published tariffs of the line-haul holding itself out to perform the entire transportation service for a through rate or charge. In such case the line-haul carrier must show any change in its own published tariffs. It cannot rely on the published tariffs of the agent which performs the terminal service for it. The general intent of the Act to Regulate Commerce is not to allow one carrier to interfere with the contract rights of the shipper growing out of his contract for through shipment with the initial carrier..... 30

IV. The Circuit Court of Appeals erred in holding that the so-called classifications in the published tariffs of the line-haul carriers and the so-called absorption clause in said published tariffs constituted the extent of the obligation of the line-haul carriers with reference to said unloading charge. The particular question determined by the Circuit Court of Appeals involved the incidental determination by the Commission of the facts with reference to the history of the charge, the custom and usage at the Union Stock Yards with reference thereto, the established relationship between the line-haul carriers and the Stock Yard Company, and the many other questions of fact hereinabove referred to. The case was one where the Circuit Court of Appeals should have accepted the findings of the Commission as to the meaning, force and effect of the published tariffs of the line-haul carriers and of the Stock

Yard Company. (*Standard Oil Co.* v. *United States*, 283 U. S. 235.) The rule is well established that tariffs prepared and filed by the carrier must be construed most strongly against the carrier and in favor of the shipper, and terminal charges will be admitted to have been waived unless it is made plain in the published tariffs of the carriers, both to the shipper and to the Commission, that the carrier is insisting upon the payment of the terminal charge..... 51

V. The Stock Yard Company, in performing the loading and unloading service, did not occupy a position analogous to that of an independent connecting carrier transporting property on its own line for a part of the distance covered by the shipment. The Stock Yard Company performed the loading and unloading service as an agent for the line-haul carriers,—performing for the line-haul carriers a service inseparably connected with the service which the line-haul carriers in their published tariffs held themselves out to perform and for which they published through rates and charges. The line-haul carriers at all times treated the Stock Yard Company as their agent, performing for them a service which they in their published tariffs held themselves out to the public to perform. The clear intent of the published tariffs of the Stock Yard Company was to restrict the application of its rates and charges to the line-haul carriers for whom it performed the unloading service as agent. The testimony before the Commission and the answers filed by the Stock Yard Company in the District Court in the instant case conclusively established this proposition. But in any event, it is wholly immaterial whether the Stock Yard Company was authorized by the line-haul carriers to publish its tariffs in such form

as to clearly indicate that the same were filed by it as the agent of the line-haul carriers and so as to make the rates and charges therein contained apply solely to the line-haul carriers, because even if not authorized so to do, the tariffs of the Stock Yard Company published in such manner could not be made the basis for any charge being made against the shipper or his consignee. While the published rates of the Stock Yard Company were its legally established rates and in that sense legal, they were not lawful as against the consignees from whom they were exacted. The distinction between a legal rate and a lawful rate is shown *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 52 Sup. Ct. Rep. 183, on page 184 59

VI. The conclusion of the Circuit Court of Appeals that the increased charge of 25 cents per car was justified by reason of the extraordinary conditions pertaining to the increased cost of labor and other expenses incidental to the unloading of live stock, was the determination of a question of fact which it was not the prerogative of that court to determine, the determination of such facts being vested exclusively in the Commission, whose determination on such question is conclusive and not subject to review by the courts, unless the Commission has acted arbitrarily or without evidence to support its conclusion, or has transcended its constitutional or statutory powers. (*Standard Oil Co.* v. *United States*, 283 U. S. 235). Furthermore, that question was not involved in this case..... 74

VII. The right of petitioners to maintain this suit may be sustained under the principles of law laid down in the *Darnell-Taenzer* case, 245 U. S. 531. The finding of the Commission, based on the determination of questions of fact, should have

been accepted by the District Court as conclusive since there was ample evidence to sustain it. Petitioners were parties directly named in the bills of lading covered by the various shipments involved in this case, who became personally liable to the line-haul carriers for all freight charges the instant they accepted delivery of the live stock, who were repeatedly recognized by respondents as the proper persons with whom to settle loss and damage claims on account of shipments of live stock consigned to them, and who directly paid the unlawful charges in controversy to respondents out of their own funds. The right of petitioners to maintain this suit is also sustained by the decision of this court in *Louisville & N. R. R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, and by the principles of law laid down in *New York Central & Hudson River Ry. Co.* v. *York & Whitney*, 256 U. S. 406. The right of either the consignor, the consignee or the owner of property to bring suit against the carriers on account of loss or injury to property shipped has always been recognized by the courts, and the right of the consignee, even though it has no pecuniary interest in the property in question, to maintain such suit has always been recognized. Plaintiffs in this case are shown by the record herein to have occupied a somewhat broader relationship to their customer shippers than that of an ordinary factor, which relationship, under the particular facts in this case, did not cease when they remitted to their customers a part only of the proceeds derived from said shipments to which their customers were lawfully entitled; by virtue of this relationship, and by their direct connection with the transportation transactions in question, petitioners had the legal right in

their own names and right to maintain said proceedings for reparation before the Commission and to maintain this suit in the District Court. The right of a factor to recover reparation on account of unreasonable or unlawful charges has been repeatedly recognized by the Commission. The right of one person having no pecuniary interest in the reparation sought to maintain a suit in his own name for the use and benefit of other persons who are the real parties in interest, and who actually sustained a pecuniary loss and injury, is in principle sustained by the decision of this court in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117. The record in this case shows that independent of the right of petitioners to maintain this suit as factors, they had express written authority from the shippers to maintain the proceedings in question, both before the Commission and in the District Court.. 75

CONCLUSION.

To allow respondents to retain the unlawful charges exacted from petitioners by means and use of the practice resorted to by respondents, would be contrary to the spirit, purpose and intent of the Act to Regulate Commerce, and would result in great injustice..... 96

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Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 52 Sup. Ct. Rep. 183 71
Atchison, T. & S. F. Ry. Co. v. Spiller, 246 Fed. 1.....93, 94
Atchison, T. & S. F. Ry. Co. v. United States, 232 U. S. 199 34
Beardsley v. Schmidt, 120 Wis. 405..... 91
Blanchard v. Page, 8 Gray. 281..... 84
Burton v. Wabash Ry. Co. (Circuit Court of Appeals, Missouri), 22 S. W. Rep. (2d Ser.) 201..... 40

Cattle Raisers' Assn. v. Chicago, B. & Q. R. R. Co., 10 I. C. C. 83 2
Cattle Raisers' Assn. v. Chicago, B. & Q. R. R. Co., 11 I. C. C. 277 2
Cattle Raisers' Assn. v. Chicago, B. & Q. R. R. Co., 12 I. C. C. 507 2
Cattle Raisers' Assn. v. Fort Worth & D. C. R. Co., 7 I. C. C. 513 2
Cattle Raisers' Assn. v. Missouri, K. & T. R. Co., 11 I. C. C. 296 2
Cincinnati Switching Absorption, 44 I. C. C. 353..... 56
Consolidated Cut Stone Co. v. Atchison, T. & S. F. Ry. Co., 39 Fed. (2d) 661..... 86
Covington Stock Yards Co. v. Keith, 139 U. S. 128..38, 39, 40, 41
Davis v. Portland Seed Co., 264 U. S. 403.....80, 81
Detroit Coal Exchange v. Director General as Agent, 80 I. C. C. 258 .....92, 93
Doughty-McDonald Grocery Co., 155 I. C. C. 47..... 78
Edgerton v. C. R. I. & P. R. Co., 240 Ill. 311..... 83
Finn v. Western R. R. Co., 112 Mass. 524..... 83
Galveston, etc. Ry. Co. v. Lykes Bros., 294 Fed. Rep. 968... 53
Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285 .....32, 33, 55
Great Western Ry. Co. v. McComas, 33 Ill. 186..... 83
Hamilton v. Dillin, Fed. Case No. 5979, reported in Fed. Cases Vol. 11 and 12, p. 332.....89, 90
Hooper v. Chicago & Northwestern Ry. Co., 27 Wis. 81.... 84
Illinois Central R. R. v. Interstate Commerce Commission, 206 U. S. 441 55
Interstate Commerce Commission v. Chicago, B. & Q. R. Co., 186 U. S. 320.....2, 5, 22, 46, 61
Interstate Commerce Commission v. Delaware, L. & W. R. R. Co., 220 U. S. 235.....34, 38, 74
Interstate Commerce Commission v. Stickney, 215 U. S. 98 .....2, 5, 22, 42, 46, 58
Lewis-Simas-Jones Co. v. Southern Pacific Co., 283 U. S. 654 24

Los Angeles Switching Case, 234 U. S. 294..... 34
Louisville & N. R. Co. v. Sloss-Sheffield Co., 269 U. S. 217 .....24, 27, 75, 76, 80, 81, 85, 86
Memphis Freight Bureau v. St. Louis & San Francisco Ry. Co. and Director General, 57 I. C. C. 212..... 92
Mills v. Lehigh Valley R. R. Co., 238 U. S. 473.....77, 92
Missouri, K. & T. Co. v. Ward, 244 U. S. 383.....50, 51
Missouri Pacific Ry. Co. v. Haynes, 72 Tex. 175, 10 S. W. 398 .....40, 41
Missouri Portland Cement Co. v. Director General, 88 I. C. C. 492 86
Mitchell Coal & Coke Co. v. Pennsylvania R. R. Co., 230 U. S. 247 35
National Dock Co. v. B. & M. R. R., 38 I. C. C. 643..... 56
New York Central & Hudson River Ry. Co. v. York & Whitney, 256 U. S. 406.....78, 81
New York Lumber Co. v. St. L. M. & S., 21 I. C. C. 304... 56
Northern Pacific Ry. Co. v. Solum, 247 U. S. 477..... 55
N. W. Steel Co. v. Director General, 68 I. C. C. 195..... 58
Pacific Rice Mills Co. v. Director General, 78 I. C. C. 459.. 58
Panhandle & S. F. Ry. Co. v. Crawford (Court of Civil Appeals, Texas) 198 S. W. 1079..... 40
Panhandle & S. F. Ry. Co. v. Phillips (Court of Civil Appeals, Texas) 197 S. W. Rep. 1031..... 40
Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184 80
Procter & Gamble v. United States, 225 U. S. 282.....38, 74
Progress Blue Ribbon Farms v. Chicago Horse Sales Co., 153 Wis. 249 .....90, 91
Smith & Son v. Bloom, 159 Iowa, 592 90
Southern Express Co. v. Kraft, 49 Miss. 480..... 84
Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531 .....75, 76, 80, 81, 85, 86
Southern Pacific Co. v. Lothrop, 15 Fed. (2d) 486..... 58
Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117.. .....93, 94, 95, 96
Standard Oil Co. v. United States, 283 U. S. 235...38, 52, 55, 74

Standard Oil Co. v. United States, 41 Fed. Rep. (2d) 836.. 52
Sutherland Flour Mills Co. v. Director General, 81 I. C. C. 365 58
Texas Live Stock Shippers' Protective League v. Director General, 139 I. C. C. 448..... 93
Union Pacific R. Co. v. American Smelting & Refining Co., 202 Fed. 720 .....78, 81
United States v. Baltimore & Ohio Ry. Co., 231 U. S. 274... 43
United States v. Erie R. R. Co., 280 U. S. 103.....78, 92
United States v. Louisville & N. R. R. Co., 235 U. S. 314..38, 74
United States v. Union Stock Yard, 226 U. S. 286.....
.....4, 5, 6, 38, 39, 42, 43
Virginian Ry. v. United States, 272 U. S. 658.....78, 92
Warehouse Co. v. United States, 283 U. S. 501.....43, 44
Western Chemical Co. v. United States, 271 U. S. 268....78, 92

Act to Regulate Commerce
Par. 3, Sec. 1 .....48, 63
Par. 3, Sec. 6 .....42, 48, 56
Par. 7, Sec. 6 48
Sec. 16, 41 Stat. L. 491..... 2
10 Corpus Juris, 349 84
25 Corpus Juris, 406 87
Hutchinson on Carriers, par. 510 40
Interstate Commerce Act
Sec. 1 .....34, 40, 41
Sec. 16, Par. 3 79
52 I. C. C. 209 36
U. S. C. A. Title 49, Sec. 15, Par. 5..... 40
Sec. 8563 (2) West Publishing Company's Compiled Statutes of United States, Vol. 8, p. 9061.....40, 41

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581.

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,

Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,

Respondents.

PETITIONERS' BRIEF ON THE MERITS.

STATEMENT OF FACTS.

On January 25, 1932, this court granted our petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division.

The opinion of the Circuit Court of Appeals is reported in 51 Fed. (2nd) 620. (R. 389)

The opinion of the District Court is reported in 39 Fed. (2nd) 80. (R. 60 to 77)

This suit is brought under Section 16 of the Act to Regulate Commerce, 41 Stat. L. 491.

The case is another chapter involving a controversy of long duration as to terminal charges of the railroads delivering live stock at the Union Stock Yards in Chicago. A history of its antecedents to the present litigation is found in *Cattle Raisers' Association* v. *Fort Worth & D. C. R. Co.*, 7 I. C. C. 513; *Cattle Raisers' Asso.* v. *C. B. & Q. R. Co.*, 10 I. C. C. 83; *Cattle Raisers' Asso.* v. *Chicago, B. & Q. R. Co.*, 11 I. C. C. 277; *Cattle Raisers' Asso.* v. *Missouri, K. & T. R. Co.*, 11 I. C. C. 296; *Cattle Raisers' Asso.* v. *C. B. & Q. R. R. Co.*, 12 I. C. C. 507; *Inter. Com. Commission* v. *Chicago, etc. Rd. Co.*, 186 U. S. 320; *Interstate Commerce Comm.* v. *Stickney*, 215 U. S. 98.

The proceedings before the Commission in the instant case involved many lengthy and protracted hearings during which the testimony of nearly a hundred witnesses was introduced. (See Original Exhibits Nos. 5-6-7-8-9-10-11-12 certified to this court as original exhibits.)

The exhibits introduced in evidence before the Commission are extraordinarily voluminous and sufficient in bulk to make a small sized truck load. (See large box and separate package of original exhibits certified to this court by the Clerk of the United States Circuit Court of Appeals.) For the convenience of this court we have compiled and caused to be printed in a volume separate from the printed record, excerpts from said original exhibits containing matters germane to the points here under discussion, which printed volume is herein referred to as "Certified Excerpts from Original Exhibits."

Petitioners brought suit as plaintiffs in the District Court to recover damages on a claim predicated on an order of the Interstate Commerce Commission awarding

reparation in the sum of $140,001.25 in favor of petitioners and against the Director General of Railroads of the United States and the Union Stock Yard & Transit Company, jointly and severally.

The order of the Commission is premised on the exaction from the plaintiffs in this suit, by the concerted action of the Director General of Railroads and the Union Stock Yard & Transit Company, of an extra charge of 25 cents per car for unloading live stock consigned to the plaintiffs at the Union Stock Yards, in Chicago, in addition to the amount for such unloading service covered by the through line-haul rates to said Stock Yards plus the $2.00 per car terminal charge in the published tariffs of the line-haul carriers, through a certain method or practice resorted to by respondents to settle a controversy between themselves concerning said extra charge.

Petitioners herein (plaintiffs in the suit in the District Court) were the consignees named in the various shipments of live stock out of which the disputed charges in this case arose, and paid each and every charge covered by the reparation order (R. 128). They were also the factors and agents of the consignors in the various shipments out of which the controverted charges arose (R. 151). The trial in the District Court was before a jury. At the close of all the evidence the court instructed the jury to return a verdict for the defendants on the sole ground that the plaintiffs were "purely volunteers" without legal right to maintain said suit (R. 77). Thereupon a judgment *nil capiat* was entered against these petitioners and for costs of suit.

Upon appeal to the Circuit Court of Appeals for the Seventh Circuit the judgment of the District Court, except as to the portions thereof relating to the awarding

of costs against the plaintiffs, was affirmed, on the ground that the practice resorted to by the line-haul carriers and the Stock Yard Company to collect the disputed extra charge of 25 cents per car from the plaintiffs was a lawful and justifiable practice (R. 389 to 399).

HISTORY OF SO-CALLED LOADING AND UNLOADING SERVICE AND CHARGES THEREFOR AND MANNER OF TREATING SAID SERVICE AND CHARGE.

In 1865 the railroads entering Chicago organized a corporation known as "Union Stock Yard & Transit Company," one of the respondents in this case. Among other things for which this corporation was organized was "to construct the necessary buildings, railroad tracks, loading and unloading platforms for the accommodation of the business of the general Union Stock Yards for cattle and other live stock, * * * to make advances of money upon such cattle and live stock for freight or other purposes, as may become expedient." (R. 123-124). (Statement of facts in *United States* v. *Union Stock Yards,* 226 U. S. 286, at page 297.)

On April 18, 1867, the Stock Yard Company established as a charge to be made by it against the line-haul carriers a loading charge of 50 cents per car and an unloading charge of 25 cents per car (R. 124). No charge was made against the line-haul carriers for the use of the tracks for the transportation of the cars of the line-haul carriers to the unloading platforms until 1894, when a charge was made against the line-haul carriers using the tracks, assessed on a per car basis, and varying to some extent with the length of the haul (R. 124). To reimburse themselves for this trackage charge and for the loading and unloading service performed by the Stock

Yard Company, the line-haul carriers published a tariff containing, in addition to the through line-haul rates to the Union Stock Yards, Chicago, a terminal or switching charge of $2.00 per car.

(See opinion of this court in *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 186 U. S. 320, at page 327, and extract from report of the Commission shown in note on pages 329 to 333.)

(See also Certified Excerpts from Original Exhibits, pp. 46, 50, 51; Original Ex. 6, pp. 511, 512; Original Ex. 7, p. 1271; Original Ex. 7, p. 1284.)

(See also *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, at page 108, where it also appears that the service of unloading live stock at the Yards was included in the $2.00 terminal charge.)

As we shall hereafter point out, the Stock Yard Company, from the time of its organization, has continuously acted as the agent of the line-haul carriers, not only in loading and unloading live stock consigned from and to the Union Stock Yards, but as their agent in collecting from the commission merchants in the Stock Yard district all transportation charges of the line-haul carriers for live stock consigned to and from the Union Stock Yards (R. 127-128). The Union Stock Yards is specifically named in the tariffs of the line-haul carriers as a station to which their line-haul rates apply (Certified Excerpts from Original Exhibits, p. 167).

For more than 50 years carriers delivering live stock at the Stock Yards in Chicago loaded and unloaded live stock, and made no charge therefor against the shipper (R. 144). The line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, for years constituted the through charge and included delivery of live stock to the consignee at the Stock Yards. (See *United*

States v. *Union Stock Yards*, 226 U. S. 286, at top of page 305.) The Commission so specifically held in the instant case (R. 144). This continued to be the uniform practice from the time the loading and unloading charge was first originated in 1867 up to May 21, 1917. On that date the Union Stock Yard & Transit Company filed new tariffs, in which it increased the amount of its loading and unloading charge to the line-haul carriers by 25 cents per car, but so as not to affect the shipper, said tariffs reciting, "The charge made by this company for the service (as a carrier's agent) of loading and unloading live stock at the Union Stock Yards at Chicago, Illinois," (R. 250-251; Original Ex. 6, pp. 316 to 341; Certified Excerpts from Original Exhibits, pp. 21 to 36 and 54 to 58).

A controversy immediately arose between the Stock Yard Company and the line-haul carriers concerning the manner of collecting this extra 25 cents per car and who should pay it, the Stock Yard Company insisting that its new tariffs, showing increased charges for the loading and unloading service, were directed against the line-haul carriers and were not applicable to the shippers, and that therefore the shippers should not be made to bear the burden of such increase (Original Ex. 6, pp. 10 to 38; Certified Excerpts from Original Exhibits, pp. 2 to 36 and 54 to 58).

In refusing to collect the additional 25 cents from the shippers or their consignees, the Stock Yard Company took the position, (1) that the duty of unloading live stock at the Union Stock Yards was that of the line-haul carriers; (2) that the Stock Yard Company sustained no such relation to the shippers which would warrant it in collecting said unloading charges, or any part thereof, from the shippers; (3) that the tariffs filed by it were

not intended to and did not affect the shippers, but were restricted to charges to be collected by it from the line-haul carriers for services performed by it "as a carrier's agent" for said line-haul carriers; (4) that the so-called unloading charge covered other services exclusively for the use and benefit of the line-haul carriers and in which the shippers could have no possible interest or benefit. (Original Ex. 6, pp. 10 to 38; Certified Excerpts from Original Exhibits, pp. 2 to 36 and 54 to 58.)

In accordance with this position the Stock Yard Company collected the freight bills of the line-haul carriers, figured on the basis of the line-haul rates plus the $2.00 terminal charge specified in the published tariffs of the line-haul carriers, but refused to collect the additional 25 cents per car from the consignees, because it was not set up on the freight bills of the line-haul carriers and because the charges in the Stock Yard Company tariff were restricted to its charges "as a carrier's agent" against the line-haul carriers and did not justify the collection of such charges from the shipper. The Stock Yard Company forced the line-haul carriers to pay the increase of 25 cents per car by withholding 25 cents per car from the freight bills of the line-haul carriers collected by it as their agent. At that time the freight bills of the line-haul carriers did not include the controverted additional charge. Thereupon the line-haul carriers threatened to collect their own freight bills in order to prevent the Stock Yard Company from withholding the additional 25 cents per car. (Original Ex. 6, pp. 472-476; Certified Excerpts from Original Exhibits, pp. 37-40.)

THE PRACTICE RESORTED TO BY RESPONDENTS TO EXACT FROM THE SHIPPER THE EXTRA 25 CENTS PER CAR IN DISPUTE AND DECLARED UNLAWFUL BY THE COMMISSION AND HELD TO BE LAWFUL BY THE CIRCUIT COURT OF APPEALS.

To settle the controversy and to furnish the basis to justify the collection of the controversial extra 25 cents per car, the Stock Yard Company and the line-haul carriers agreed upon the following practice: The line-haul carriers did not amend their tariffs (R. 390), but after making out their freight bills on the basis of the line-haul rates and said $2.00 terminal charge specified in their published tariffs, added to the amount of freight charges thus ascertained the additional charge of 25 cents per car not mentioned in their published tariffs; the freight bills thus made out immediately after each shipment was unloaded were turned over for collection by the line-haul carriers to their agent, the Stock Yard Company; twice each week—on Monday and Thursday—the Stock Yard Company collected from the petitioners herein the amount of the total freight charges of the line-haul carriers then due, including the controversial extra charge of 25 cents per car, and on Monday of each succeeding week turned over to the line-haul carriers the entire amount thus collected without deduction. Thereafter, once each month, the line-haul carriers paid the Stock Yard Company the total amount of its loading and unloading charges for the previous month on the basis of the increased charges set forth in the new tariffs filed by the Stock Yard Company. The result of the practice was that respondents settled the controversy between themselves as to the extra charge of 25 cents per car by exacting it from petitioners. (Original Ex. 6, pp. 472-476; Certified Excerpts from Original Exhibits, pp.

37-40; Original Ex. 6, pp. 10 to 38; Certified Excerpts from Original Exhibits, pp. 2 to 21; Original Ex. 6, pp. 496, 497, 579; Certified Excerpts from Original Exhibits, pp. 40-41, 51 to 58.) *This is the practice referred to in the report of the Commission* (R. 123), *and the practice which was declared unlawful and unreasonable by the Commission* (R. 145). The practice inaugurated by the Stock Yard Company and the line-haul carriers before the period of Federal Control was continued by the Director General of Railroads during the entire period of Federal Control (R. 217-218).

NATURE OF OPERATION AND ENUMERATION OF DIVERS SERVICES COVERED BY THE SO-CALLED LOADING AND UNLOADING CHARGES.

The record shows, without contradiction, that the so-called loading and unloading charges cover compensation to the Stock Yard Company not only for the performance of the loading and unloading service at the Union Stock Yards, but cover divers other services rendered for the sole use and benefit of the line-haul carriers. The matter of the handling of shipments of live stock from the time the live stock trains arrive at the unloading chutes of the Stock Yard Company involves not merely the unloading of the live stock, but involves a joint operation and concert of action between the employees of the line-haul carriers and the employees of the Stock Yard Company. This joint operation, at the time covered by the charges exacted in this case, is described in the present tense as follows (Certified Excerpts from Original Exhibits, pp. 22 to 33):

The shipments of live stock are invariably consigned to a commission firm located within the confines of the

Union Stock Yards district. The line-haul carrier in completing its haul to the billed destination hauls the train of live stock to the chutes of the Stock Yard Company with its own power and its own train crew. The stock is then unloaded by employees of the Stock Yard Company. While the cars are being unloaded the conductor of the line-haul carrier in charge of the train takes the waybills of the line-haul carriers and the live stock stubs thereto attached to the Clerk of the Division Office of the Stock Yard Company, who in turn hands them to an employee of the Stock Yard Company in the order in which they are received. This employee, referring to the waybills and attached live stock stubs, from a pulpit provided for that purpose, calls the car numbers, contents and names of the consignees to the waiting commissionmen's employees, thus giving notice of the arrival of the stock to the commissionmen. The waybills and live stock stubs are then turned back to the Clerk of the Division Office of the Stock Yard Company, where a permanent record, known as the "Yard Book", is made, and which is thereafter the official record of the line-haul carriers of the receipt of the live stock contained in the live stock trains. At the same time a bulletin is prepared, showing the name of the consignor, consignee, car number, and contents of the car by classes of animals—cattle, horses, hogs or sheep. After the permanent record and bulletin are made, the waybills and live stock stubs are returned by a messenger of the Stock Yard Company to the line-haul carriers' local representative, who in turn forwards the same to the Western Weighing Association Bureau (a bureau of the line-haul carriers) for the purpose of securing data concerning the actual weight of the contents of the cars unloaded. The Association Bureau then forwards the waybills and

live stock stubs attached to the respective commission merchants named as consignees in the various shipments, who insert the weight of the animals and return the same to the Western Weighing Association Bureau, which in turn sends the same back to the local representative of the line-haul carrier for final revision. After the final revision is made by the line-haul carriers, the waybills and live stock stubs attached are sent to the accounting office of the Stock Yard Company, where the debits and credits evidencing the amount due from the commissionmen to the line-haul carriers for the total amount of the freight charges involved in such shipment are recorded.

As a part of this joint operation the Stock Yard Company—

(a) Guarantees the collection of the total freight charges of the line-haul carriers from the commissionmen, consignees named in said shipments;

(b) Makes a systematic count of the contents of each car regarding the number of dead and crippled animals therein, and makes a final record of such facts on which the line-haul carriers rely in the settlement of claims against them for injured, dead and missing animals;

(c) Removes the dead animals from the cars;

(d) Collects and turns over to the line-haul carriers, without deduction, the total amount of the line-haul carriers' freight charges.

(Certified Excerpts from Original Exhibits pp. 22 to 33.)

For all of the services performed in said joint operation and in the particular service hereinabove set forth the Stock Yard Company is directly paid by the line-haul carriers the amount of the so-called loading and unloading charges set forth in the published tariffs of

the Stock Yard Company, plus in some instances the charge for weighing. (R. 127) (See Certified Excerpts from Original Exhibits, pp. 61 to 64, 68.)

STOCK YARD COMPANY MADE NO ATTEMPT TO MERELY CANCEL THE INCREASED CHARGES CONTAINED IN ITS TARIFF OF MAY 21, 1917, INDEPENDENTLY OF THE ATTEMPT TO WITHDRAW ALL TARIFFS AND MAKE THE LOADING AND UNLOADING SERVICE THE SUBJECT MATTER OF PRIVATE CONTRACT BETWEEN STOCK YARD COMPANY AND LINE-HAUL CARRIERS.

The adoption of the practice resorted to by the line-haul carriers and the Stock Yard Company, to exact the controversial extra 25 cents per car from the shipper, created such a furor among the commission men at the Union Stock Yards that the Stock Yard Company, on September 1, 1917, made application to the Interstate Commerce Commission not only to withdraw its new tariffs of May 21, 1917, *but to withdraw all of its published tariffs, inseparably coupled with a request to the Commission to approve its proposed plan of making the entire subject of loading and unloading charges a matter of private operating arrangements between the Stock Yard Company and the line-haul carriers* (R. 250-251). Simultaneously with the filing of said application to withdraw all published tariffs and for the approval of the Commission to make the entire subject matter of loading and unloading charges a matter of private operating arrangements between the Stock Yard Company and the line-haul carriers, the Stock Yard Company sent to each of the common carriers entering the City of Chicago a letter stating, among other things, the following:

> "The loading and unloading docks and platforms of the Union Stock Yard & Transit Company of Chicago are nothing more or less than the terminals of

> the lines handling live stock for delivery within this District; and therefore the attempt on the part of the Stock Yard Company to cover the use of these facilities by a tariff, instead of placing the same on an operating basis is and always has been a mistake."

(R. 251; Certified Excerpts from Original Exhibits, pp. 5-6)

In the same letter it was stated:

> "The directors of the Union Stock Yard & Transit Company of Chicago have determined to cancel, and have cancelled their so-called tariff • • • heretofore filed with the Interstate Commerce Commission, and to make a rental charge for the terminal facilities furnished to and used by the lines carrying live stock to and from this market."

(R. 251; Certified Excerpts from Original Exhibits, pp. 5-6)

PETITIONERS PAID THE UNLAWFUL CHARGES.

Petitioners were specifically named as consignees in the bills of lading covering all of the shipments involved in this case. Upon arrival of the cars at the Union Stock Yards, petitioners as such consignees either paid or directly assumed all transportation charges. Such transportation charges, including the unlawful charges in question, were paid by petitioners by bank checks drawn on their individual bank accounts. (Certified Excerpts from Orig. Ex., p. 156—Original Ex. 8). Afterwards they, in their own names and right, as factors, sold the live stock consigned to them, and after deducting all freight and other expenses, including the unlawful charges in question, either remitted the proceeds to the consignor or credited the amount on the consignor's account. (R. 151, 329 to 331; Original Ex. 8, pp. 25 to 96

and 96 to 134; Original Ex. 9, pp. 21 to 685; Certified Excerpts from Original Exhibits, pp. 136 to 156.)

In the various hearings before the Commission there was a vast amount of testimony introduced showing in detail the relationship between the commission merchants, members of the Chicago Live Stock Exchange, and the shippers whose rights were involved in the various shipments out of which the claims for overcharges arose, the established custom existing between such commission merchants, members of said Chicago Live Stock Exchange, and the shippers shipping live stock into the Union Stock Yards, with reference to the duty and authority of the members of the Exchange to present and prosecute, for and on behalf of the shippers, claims for injuries to stock and overcharges in freight and feeding bills, and with reference to the particular authority and authorization of the plaintiffs in this case to present and prosecute these particular claims for reparation for and on behalf of said shippers. Testimony as to such matters is shown throughout the voluminous testimony taken before the Commission in the various hearings of the matters involved in this case. (Certified Excerpts from Or. Ex. 90, 92; Original Exhibit 8, pp. 25 to 96)

Testimony showing said established custom existing between said commission merchants, members of said Chicago Live Stock Exchange, and the shippers shipping live stock into said Union Stock Yards, with reference to the duty and authority of the members of the Exchange to present and prosecute, for and on behalf of the shippers, claims for injuries to stock and overcharges in freight and feeding bills, and with reference to the particular authority and authorization of the plaintiffs in this case to present and prosecute the particular claims for reparation involved in this case for and on behalf of

said shippers, is also shown by the testimony of fifty of said commission men at the hearing before said Interstate Commerce Commission on October 3, 1922, as shown by Defendants' Original Exhibit 9, referred to on page 270 of the Record, and by the testimony of twelve other members of said Chicago Live Stock Exchange, who testified to the same effect at the hearing before said Interstate Commerce Commission in this cause on October 9, 1922, said testimony being contained in Defendants' Original Exhibit 10, referred to on page 270 of the Record, and by thirty members of said Chicago Live Stock Exchange who testified before the Commission at the hearings on November 6, 7, 8 and 9, 1922, said testimony being contained in Defendants' Original Exhibit 11, referred to on page 271 of the Record.

The testimony of H. R. Park, on July 14, 1921, (Original Ex. 8, pp. 96 to 126) shows not only a custom prevailing making it the duty of the commission men, members of the Chicago Live Stock Exchange, in presenting and prosecuting, in behalf of the shippers of live stock to the Union Stock Yards, claims for injuries to stock and overcharges in freight and feeding bills, *but also shows the express authorization by all of the shippers of shipments covered by the claims presented by the plaintiffs in this case and filed with the Interstate Commerce Commission in behalf of said shippers.* (Certified Excerpts from Original Exhibits, p. 140, 153.)

In its order of June 2, 1925, the Commission specifically found (R. 151):

> "We find that the following individuals, copartnerships and corporations, parties of record, made the shipments as described in this and our preceding reports, and paid the charges thereon herein and heretofore found to be unreasonable and unlawful; that they have been damaged in the amount of such

charges, and are severally entitled to reparation as factors and agents for the shippers, with interest from date of payment."

This finding is followed by an enumeration of the names of the plaintiffs in this case.

On December 12, 1927, the Commission filed in said Consolidated Nos. 9977 and 12614, its order (R. 158-208) supplementing its order of June 2, 1925, specifically fixing the several amounts to which said commission men and members of said Chicago Live Stock Exchange were entitled to recover by way of reparation, the aggregate amount of said order of reparation being $140,001.25 over and above the amounts assessed against the line-haul carriers for exaction of the disputed charge during the period immediately prior to the period of Federal Control which latter amounts were paid before this suit was instituted in the District Court. The said order of December 12, 1927, recites that it is based upon the report of June 2, 1925, which report is "hereby referred to and made a part hereof."

The plaintiffs in the petition filed in the District Court to recover damages based on said award of reparation are the commission men and members of the Exchange specifically named in said order of December 12, 1927 (R. 157-208), and who are also specifically mentioned and described in the order of the Commission of June 2, 1925 (R. 147-156), and in the complaint filed by the Chicago Live Stock Exchange in I. C. C. Docket No. 12614 (R. 258-265); and who, though not specifically named in the complaint filed by the Chicago Live Stock Exchange in I. C. C. Docket No. 9977 (R. 243-256), are referred to and described as members of the Chicago Live Stock Exchange in whose behalf said complaint states it is filed.

Respondents in the District Court introduced substan-

tially no evidence other than the testimony taken before the Interstate Commerce Commission and the various complaints and exhibits filed with the Commission.

Specification of Errors.

1. The Circuit Court of Appeals erred in not accepting as conclusive the finding of the Commission based on sufficient evidence that the duty of unloading live stock at the Union Stock Yards was a duty of the line-haul carriers, and in substituting its judgment for that of the Commission in holding that such duty was on the shipper.

2. The Circuit Court of Appeals should have accepted as conclusive the finding of the Commission that "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for many years constituted the through charge and included delivery of live stock to the consignee at the Stock Yards," inasmuch as the determination of that question was inseparably bound up with the determination of questions of fact involving not only a construction of the language of a multitudinous mass of complicated tariffs, classifications and supplements, but voluminous facts involving the history of the unloading charge, the relation of the unloading service with other services performed by the Stock Yard Company for the exclusive use and benefit of the line-haul carriers, and other questions of fact.

3. The Circuit Court of Appeals should have accepted as conclusive the finding of the Commission based upon sufficient evidence and involving an administrative matter to the effect that the practice resorted to by respondents to collect from petitioners the extra 25 cents per car was an unlawful and unreasonable practice.

4. The Circuit Court of Appeals erred in its conclusion that the collection of the charges complained of

was made by respondent Stock Yard Company, and that such fact absolved the line-haul carriers from any liability to petitioners arising out of the exaction of the controversial extra charge of 25 cents per car for unloading live stock through the practice adopted by the line-haul carriers and the Stock Yard Company to exact said charge from petitioners.

5 The Circuit Court of Appeals erred in holding that the Stock Yard Company was compelled by law to collect from petitioners the extra 25 cents per car in controversy.

6. The Circuit Court of Appeals erred in holding that the increased charge of 25 cents per car was justified by reason of the extraordinary conditions existing at the time said charges were collected and on account of the increased cost of labor and other expenses connected with said unloading service for the following reasons:

(a) The court had no power or authority to determine that question of fact.

(b) If the court had such power, it could not determine that question without taking into consideration the uncontradicted fact that the line-haul rates of the line-haul carriers, which included a part of the unloading charge, were on account of the very conditions mentioned by the Circuit Court of Appeals increased three successive times, the first increase being 5 per cent, the second increase being 15 per cent, and the third increase being 25 per cent, of the theretofore existing line-haul rates.

7. The Circuit Court of Appeals erred in affirming the judgment of the District Court predicated on the theory that petitioners had no right to maintain the proceedings in question before the Interstate Commerce Commission and to prosecute said suit in the District Court for damages on account of the exaction from them of the unlawful 25 cents per car.

ARGUMENT.

I.

STATEMENT OF FUNDAMENTAL PROPOSITION INVOLVED.

The underlying fundamental proposition in this case is that it is an action in tort brought against respondents as joint tort feasors on account of the exaction from petitioners of unlawful charges by the means and use of an unlawful practice resorted to by respondents to exact from petitioners an extra 25 cents per car for the unloading of live stock at the Union Stock Yards in Chicago in order to settle a controversy between themselves with reference to said extra charge.

That practice was unreasonable and unlawful for the following reasons:—

(1) The published tariffs of the line-haul carriers undertook the complete transportation of live stock to the Union Stock Yards at Chicago for a through rate or charge therein provided for such complete transportation, including the unloading thereof, and therefore the right of the shipper growing out of such published tariffs of the line-haul carriers could not be disturbed or increased except by a change made in the published tariffs of the line-haul carriers (Certified Excerpts from Original Exhibits, pp. 167-169).

(2) That said extra charge of 25 cents per car as against the shippers of live stock was an unauthorized and unlawful charge, because the imposition of the same upon the shippers was not justified either on the basis of the published tariffs of the line-haul carriers or on the basis of the published tariffs of the Stock Yard Company

(Certified Excerpts from Original Exhibits, pp. 77, 78, 79).

(3) The Stock Yard Company in performing this service was acting as a mere agency or instrumentality of the line-haul carriers in the performance of such unloading service; in such case it is not consistent with the spirit and intent of the Act to Regulate Commerce that the identical service of unloading live stock undertaken and charged for in the published tariffs of the line-haul carriers should be also made the subject matter of the independent control and charge of the agency or instrumentality performing that service;

(4) Under the particular facts and circumstances in this case, the exaction from petitioners, through the joint action and cooperation of the line-haul carriers and the Stock Yard Company, was a wrongful and tortious act which rendered respondents jointly and severally liable to make reparation on account of the unauthorized charges exacted from petitioners as a result of such practice, regardless of which of them in the first instance actually or physically received such charges.

This underlying fundamental proposition must be kept in mind in the consideration of this case, both with reference to the right of petitioners to maintain this suit and with reference to the liability of each of the respondents for the acts of each other in the promulgation of the practice adopted by them.

II.

THE CIRCUIT COURT OF APPEALS SHOULD HAVE ACCEPTED AS CONCLUSIVE THE FINDING OF THE COMMISSION BASED UPON SUFFICIENT EVIDENCE AND INVOLVING A PURELY ADMINISTRATIVE MATTER TO THE EFFECT THAT THE PRACTICE RESORTED TO BY RESPONDENTS TO COLLECT FROM PETITIONERS THE EXTRA 25 CENTS PER CAR WAS AN UNLAWFUL AND UNREASONABLE PRACTICE.

It appears reasonably certain from a reading of the opinion of the Circuit Court of Appeals that the court did not fully understand what the practice resorted to by respondents to exact the controversial extra 25 cents from petitioners really was. In order to properly understand what that practice was it is necessary to read the reports and findings of the Commission in the light of the evidence introduced before the Commission.

From the opinion of the Circuit Court of Appeals it clearly appears that the court was laboring under the impression that the practice condemned was that of setting up in published tariffs a separate terminal charge covering the unloading service. This is made apparent by the following language of the opinion (R. 395):

> "Since the passage of the Interstate Commerce Act, the right to make separate terminal charges seems clear, but with a limitation that such charges if themselves reasonable, must not, in connection with all the other transportation rates, produce an unreasonable aggregate."

We do not now contend, and never have contended, that a terminal service such as the unloading of live stock may not be properly set up in the published tariffs of a common carrier in a separate terminal charge in addition to its line-haul or commodity rates and charges. That this may be done admits of no doubt. Nor is there

any doubt as to the law that such terminal charges, if reasonable in themselves, and in connection with other transportation rates produce a reasonable aggregate for the performance of the entire transportation service, are proper and will be sustained. (*I. C. C.* v. *C. B. & Q. R. R.*, 186 U. S. 320; *I. C. C.* v. *Stickney*, 215 U. S. 98.) But the practice condemned by the Commission and held to be unreasonable and unlawful was something wholly different from that merely of setting up the charges for the unloading service in a separate terminal charge. The practice resorted to by respondents to exact from petitioners the extra 25 cents per car in controversy and condemned by the Commission, and the facts which caused the adoption of such practice, are indisputably shown by the record before the Interstate Commerce Commission to be as stated in our statement of facts, *supra*, p. 8.

The unlawfulness or unreasonableness of the practice resorted to by respondents must be considered in the light of the facts and circumstances in the case, including the relationship between the line-haul carriers and the Stock Yard Company as it had existed for half a century, and the history of the unloading charge and the established custom and usage with reference thereto.

The approval by the Circuit Court of Appeals of the practice involved is without precedent. It establishes the precedent that a line-haul carrier who has for fifty years assumed the entire burden of the expense connected with the performance of a terminal service, and who has during such time continuously performed such service through the instrumentality of an agent, and who, ever since the enactment of the Act to Regulate Commerce, has in its published tariffs established through rates which included the terminal service, may, without

changing its published tariffs, lawfully unite with the agency performing the terminal service in a practice whereby there is exacted from the shipper an additional charge over and above the through rate specified in the published tariffs of the line-haul carrier.

Counsel for respondents contend that the Circuit Court of Appeals in its opinion made no reference to this question, and that therefore such proposition is not before this court for review. The appeal in this case is from the decision of the Circuit Court of Appeals and not from its opinion; since, therefore, the necessary result of that decision is to produce this result as applied to the particular facts in the case, that question is properly before this court for review.

PETITIONERS HAVE NEVER ADMITTED THAT CHARGES OF STOCK YARD COMPANY WERE EITHER REASONABLE, PROPER OR LAWFUL.

In the brief filed by respondent Union Stock Yard & Transit Company in opposition to petition for writ of certiorari, it is repeatedly said, with differing phraseology, that it seems to be conceded in the petition and brief in support thereof that the collection of the charges of the Yards Company was proper. For example, on page 22, it is said:

> "The entire argument made to this court is that the Director General should be required to pay the increased charges of the Yards Company, there being no contention that the retention and collection of those charges by the Yards Company was improper."

We emphatically deny this conclusion, and regret the attempt to obscure the issues. Our contention is, and always has been, that the exaction from the shipper or

consignee of the controversial extra 25 cents per car, through the means and by the use of the practice resorted to by respondents to settle between themselves a controversy with reference to that charge, was improper and unlawful, both on the part of the Stock Yard Company and of the line-haul carriers; that in the promulgation of said practice they were joint tort feasors, engaged in a common enterprise, and that it is wholly immaterial in this case which of them in the first instant collected the unlawful charge, and which of them retained it; that the wrong done was the exaction of the unlawful charge regardless of who received it or benefitted by it. (*Louisville N. R. Co.* v. *Sloss-Sheffield*, 269 U. S. 217.)

The Stock Yard Company justified the collection of the extra 25 cents per car on the ground that its authority to make such collection was contained in the freight bills turned over to it for collection by the line-haul carriers. The Stock Yard Company was charged with notice that the extra 25 cents per car endorsed on the freight bills of the line-haul carriers was not justified by the published tariffs of the line-haul carriers, and presumed to know that if it united with the line-haul carriers to exact from the shipper a charge not justified by the published tariffs of the line-haul carriers, that both it and the line-haul carriers would be jointly and severally committing a tort against the person from whom the charge was collected, which rendered both jointly and severally liable to make reparation. (*Lewis* v. *Southern Pacific Co.*, 283 U. S. 654.)

QUESTION AS TO WHETHER LINE-HAUL CARRIERS SHOULD HAVE ABSORBED THE INCREASED CHARGES OF THE YARDS COMPANY IS NOT INVOLVED.

Nor should the issue in this case be confused by the oft-repeated assertion of counsel for both respondents that the real question in this case is whether or not the line-haul carriers were legally required to absorb the increase of 25 cents per car in the published tariffs of the Stock Yard Company. That was the bone of contention and issue between the Stock Yard Company and the line-haul carriers before the adoption of the practice resorted to by respondents to settle that controversy. However, the moment respondents, by joint and concerted action, by the means and use of the practice resorted to by them, exacted from the consignees at the Stock Yards the extra 25 cents per car, the question of whether the line-haul carriers could be compelled to absorb the additional 25 cents per car entirely disappeared, and the sole issue which remained was whether or not the Stock Yard Company and the line-haul carriers, by exacting the controversial extra 25 cents per car from the consignees at the Stock Yards, through the joint practice resorted to by them, were liable, jointly and severally, to make reparation on account of such exaction. As we have heretofore pointed out, the determination of that question did not involve, one way or the other, the unreasonableness of any charge in the published tariffs of the Stock Yard Company from the standpoint of being excessive. Manifestly, the collection of a reasonable charge from the standpoint that it is not excessive for the service performed may be unlawful because not set up in published tariffs, as required by law, or because the same is collected from a person or

corporation other than the one from whom the published tariffs provide it shall be collected.

We are not, however, conceding that the charge considered by itself was reasonable. But whether it was or was not is wholly immaterial in this case.

THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS THAT THE STOCK YARD COMPANY IN EFFECT COLLECTED THE CONTROVERSIAL CHARGE FROM THE SHIPPER OR CONSIGNEE, AND THAT SUCH CIRCUMSTANCE ABSOLVED BOTH THE STOCK YARD COMPANY AND THE LINE-HAUL CARRIERS FROM LIABILITY, IS UNSOUND.

By an ingenuous process of reasoning the Circuit Court of Appeals arrives at the conclusion that the Stock Yard Company, being a common carrier, was required to publish its tariffs of rates and charges and under penalty of law compelled to collect the same; that the practice resorted to by the Stock Yard Company and the line-haul carriers to exact the controversial extra 25 cents per car from the consignees merely resulted in the Stock Yard Company obtaining the extra 25 cents per car which it was compelled to do under its published tariffs, and that the practice condemned by the Commission was therefore lawful. The court, in coming to this conclusion completely overlooked the object, purpose and effect of the practice.

The wrong perpetrated by the Stock Yard Company was this:— Knowing that the rates and charges for the loading and unloading service contained in its published tariffs were charges applicable only to the line-haul carriers for whom it performed the loading and unloading service as agent, and knowing, or being charged with notice, that under the published tariffs of

the line-haul carrier the shipper had the right, upon payment of the through rates and charges therein specified, to the complete transportation of his live stock to the Union Stock Yards, including unloading, it nevertheless joined with the line-haul carriers in a practice whereby the 25 cents per car in controversy between it and the line-haul carriers was added to the line-haul carriers' freight bills and collected from petitioners herein,—with the necessary result that there was exacted from petitioners 25 cents per car more than that set up in the published tariffs of the line-haul carriers for the entire transportation service including unloading.

The gist of the wrong done was the violation of the shipper's right growing out of the published tariffs of the line-haul carriers with whom he contracted.

It is wholly immaterial whether, as a result of this practice, the Stock Yard Company actually received more than it was entitled to receive or legally compelled to collect for the service rendered. The cause of action in this case arose against the Stock Yard Company and the line-haul carriers not because of the receipt by them, or either of them, of the unlawful charge; the wrong done which gave rise to the cause of action, was the exaction from the consignees of the shipments in question of the unlawful charge regardless of who received it or benefited by it. (*Louisville N. R. Co.* v. *Sloss-Sheffield*, 269 U. S. 217.)

However, both the Stock Yard Company and the line-haul carriers were directly benefited by the result of the practice resorted to. When the Stock Yard Company filed its increased tariffs on May 21, 1917 directed against the line-haul carriers for service which it performed for them as their agent and the line-haul carriers refused to pay the increase, the Stock Yard Com-

pany was confronted with the necessity of bringing the controversy between it and the line-haul carriers to the Interstate Commerce Commission for its determination. This the Stock Yard Company did not want to do because by so doing it would subject itself and its business with the line-haul carriers to the jurisdiction of the Commission, thus militating against its contention that it was not a common carrier subject to the provisions of the Act to Regulate Commerce and that the matter of its rates and charges for services rendered the line-haul carriers at the Union Stock Yards was a matter of private agreement or contract between itself and the line-haul carriers. On the other hand, the line-haul carriers, when confronted with the increase in the loading and unloading charge made against them in the published tariffs of the Stock Yard Company, could have brought the controversy between itself and the Stock Yard Company before the Interstate Commerce Commission for its determination. This the line-haul carriers did not want to do because then one of the questions before the Commission would have been whether the line-haul rates to the Union Stock Yards plus the $2.00 per car terminal charge (in view of the fact that the line-haul rates had been increased by flat raises of 5 per cent, 15 per cent and 25 per cent, respectively) were sufficient to require the line-haul carriers to absorb the increase made in the published tariffs of the Stock Yard Company. If the line-haul carriers had not added the additional 25 cents per car to their freight bills, the same would not have been exacted from the shipper. On the other hand, if the Stock Yard Company had not collected the 25 cents per car from the shipper on the basis of an arbitrary charge of that amount on the freight bills of the line-haul carriers, it

would never have been exacted from the shipper. Furthermore, if the Stock Yard Company had acquiesced in the threat of the line-haul carriers and thereupon the line-haul carriers had collected their own freight bills from the consignees, the extra 25 cents per car would not have been exacted from said consignees and the Stock Yard Company would have been compelled to collect the increase from the line-haul carriers or file a complaint with the Commission. This accounts for the willingness of the Stock Yard Company to join in the practice condemned by the Commission.

Clearly, the joint concerted action of respondents in exacting from the shipper the 25 cents per car in question rendered them jointly and severally liable to make reparation regardless of which of them may be said to have collected the same, and regardless of which of them benefited thereby. It is elementary that there is no agency in the commission of a tort. All who unite in the commission of a tort are jointly and severally liable as principals to the one in whom the cause of action is vested.

It is the intent of the Act to Regulate Commerce to require the carriers to proceed in the publication of their tariffs and in the collection of their published rates and charges in an open, direct and straight-forward manner. It does not tolerate circuitous methods or subterfuges to accomplish indirectly what cannot be lawfully accomplished directly. It does not countenance a "sleight-of-hand" practice whereby the shipper is compelled to pay a charge not justified by the published tariffs of the principal with whom he contracts for the complete transportation of his live stock; especially is this true under the particular facts and circumstances in this case.

The proper and lawful thing for the Stock Yard Com-

pany and the line-haul carriers to have done when the controversy between them arose as to the increase of 25 cents per car in the published tariffs of the Stock Yard Company, was to have referred that matter to the Commission for its decision. They chose, however, for reasons deemed sufficient by themselves, to avoid the determination of the controversy by the Interstate Commerce Commission and to resort to the practice of settling the controversy by saddling the extra 25 cents per car on the shipper.

III.

THE CIRCUIT COURT OF APPEALS ERRED IN NOT ACCEPTING AS CONCLUSIVE THE FINDING OF THE COMMISSION BASED ON SUFFICIENT EVIDENCE THAT THE DUTY OF UNLOADING LIVE STOCK AT THE UNION STOCK YARDS WAS A DUTY OF THE LINE-HAUL CARRIERS, AND IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COMMISSION IN HOLDING THAT SUCH DUTY WAS ON THE SHIPPER.

While all of the questions involved are more or less inextricably bound up with each other, in our judgment the outstanding question in this case is whether or not, during the period covered by the reparation order in this case it was the duty of the line-haul carriers, under their published tariffs, construed in the light of the particular custom, usage, facts and circumstances in this case, to unload live stock at the Union Stock Yards in Chicago. The items for which reparation is sought being confined exclusively to unlawful charges exacted from petitioners, growing out of the unloading of live stock at the Union Stock Yards in Chicago, the question involved concerns the duty of the line-haul carriers to unload live stock at that particular point. The question as to the

duty of the line-haul carriers to unload live stock at any other station or point is not involved.

The first question which arises on this phase of the case is: Is the determination of the question of the duty of the line-haul carriers under their published tariffs construed in the light of the particular facts and circumstances in this case, including the history of the unloading service at the Union Stock Yards, purely a question of law, or is it a question of mixed law and fact?

If it is a question purely of law, we concede that the Circuit Court of Appeals had the undoubted right to substitute its judgment for that of the Commission on that question, subject, of course, to review by this Court. On the other hand, if the determination of that question is not purely a question of law, but a question dependent upon the facts, or is a mixed question of law and fact, the Circuit Court of Appeals was without power or authority to substitute its judgment for that of the Commission on that subject. Whether the determination of that question was purely a question of law, or whether it was dependent upon the determination of facts, it is our contention that the Circuit Court of Appeals, in arriving at the conclusion that such duty was on the shipper, except to the extent the line-haul carriers in the absorption clauses in their published tariffs had assumed a part of the expense involved in the performance of that duty, was clearly wrong and without judicial precedent.

THE QUESTION AS TO WHETHER IT WAS THE DUTY OF THE LINE-HAUL CARRIERS OR OF THE SHIPPERS TO UNLOAD LIVE STOCK AT THE UNION STOCK YARDS IN CHICAGO WAS A QUESTION NECESSARILY DEPENDENT UPON THE DETERMINATION OF PARTICULAR FACTS RELATIVE TO THE HISTORY OF THE UNLOADING CHARGE, THE ESTABLISHED CUSTOM AND USAGE WITH REFERENCE THERETO AT THE UNION STOCK YARDS, AND OTHER INCIDENTAL FACTS.

We concede that where the only question involved is the meaning of the language of a published tariff, the determination of that question is ordinarily a question of law, the same as where the question of the meaning of any other instrument in writing is involved. But where the construction of a tariff is dependent upon the incidental determination of certain underlying facts, the question of the construction of a tariff is not then purely a question of law.

This rule is well stated by Mr. Justice Brandeis in *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, on page 291:

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution."

On page 292 this court says:

> "But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made

by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy."

The rule as established by this court is that where an adequate consideration of the controversy requires acquaintance with many intricate facts of transportation and a subsequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or charges, or allowances, which may be made to shippers for instrumentalities supplied and services rendered, the question is not one purely of law, but is a question primarily for the determination of the Commission. (See *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, at page 294.)

It is obvious that the Circuit Court of Appeals, in reaching the conclusion that it was the duty of the shipper to unload live sctock at the particular time and place in question, substituted its judgment for that reached by the Commission in its final reports, findings and orders. In so doing that court overlooked the law repeatedly laid down by this court that what constitutes "reasonable necessities of transportation at a given place and time" and what are or are not reasonable practices in regard to the collection of rates and charges are matters inseparably connected with the rate-making power committed to the Commission. Obviously, no rate for the transportation of live stock can be intelligently considered and approved or disapproved by the Commission unless, as one of the necessary conditions precedent, it is determined by the Commission whether the obligation to unload live stock at the point of destination is on the shipper or on the line-haul carrier. If the obligation rests upon the shipper, then no compensation to the carrier for such service can be included in the rates and charges in the published tariffs of the line-haul carriers.

On the other hand, if the unloading service is a part of the general transportation service which it is the duty of the carrier to provide, a proper allowance must be made for such unloading service in the published tariffs of the line-haul carriers. Necessarily, therefore, the determination by the Circuit Court of Appeals that the duty to unload live stock at the place and time in question was on the shipper was a determination of one of the questions of fact necessarily incidental to the function of rate-making which Congress has committed to the administration of the Commission and not to the court.

In *Atchison, T. & S. F. Ry. Co.* v. *United States,* 232 U. S. 199, one of the questions raised was whether the court in reviewing an order of the Interstate Commerce Commission could interfere with the judgment of the Commission holding that transportation of ice to the refrigerator cars of the carriers was a part of the transportation transaction contemplated by Section 1 of the Interstate Commerce Act. On page 220 it is said:

> "these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such power. They cannot make rates. They cannot interfere with rates fixed or practices established by the Commission, unless it is made plainly to appear that those ordered are void."

See *Interstate Commerce Commission* v. *Delaware, L. & W. R. R. Co.,* 220 U. S. 235.

See *Los Angeles Switching Case,* 234 U. S. 294, where the court on pages 310 and 311 says:

> * * * "it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a

substituted service which is substantially a like service to that included in the line-haul rate and not received, *is a question of fact to be determined according to the actual conditions of operation.* Such a question is manifestly one upon which it is the province of the Commission to pass. We must therefore take the findings of the Commission in the present case as to the character and manner of use of the industrial spurs in Los Angeles— * * * —as conclusions of fact. Assuming that they were based upon evidence, they are not open to review." (Italics ours.)

In *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, the court says:

"In considering administrative questions as to reasonableness the elements of the problem are the same whether they involve the validity of obsolete allowances, discarded tariffs, or current rates and *practices.* In both cases there is a call for the exercise of the rate-regulating discretion and the same necessity for having the matter settled by a single tribunal." (Italics ours.)

In *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, it is said:

"The rule which requires a preliminary determination of administrative questions by the Commission applies not only to those cases where the question involved is whether a particular rate is reasonable or whether a particular practice is discriminatory, *but likewise to any practice of the carrier which gives rise to the application of a rate.*" (Italics ours.)

In the case at bar the question as to whether it was the duty of the line-haul carriers to unload live stock consigned to petitioners at the Union Stock Yards in Chicago, was dependent upon the determination of the following questions purely of fact:

(1) The history of the unloading charge; (2) The established custom and usage at the Union Stock Yards,

with reference thereto; (3) the relationship between the line-haul carriers and the Stock Yards Company; (4) whether or not compensation to the line-haul carriers on account of the performance of the unloading service was included in the through line-haul rate to the Union Stock Yards in Chicago plus the $2.00 terminal charge; (5) whether on account of the congested conditions at the Union Stock Yards in Chicago, and on account of the confusion which would ensue if the shipper attempted to unload his live stock at the Union Stock Yards, it was the duty of the line-haul carriers to perform this service; (6) The question of fact as to shipper being barred or prohibited by rules of Stock Yards from unloading his own stock at that terminal; (7) whether the so-called unloading charge in fact covered other services for the exclusive benefit of the line-haul carriers, such as the guaranteeing and collection by the Stock Yard Company of the entire freight bills of the line-haul carriers; the making and keeping of a record of dead and injured animals on the basis of which the line-haul carriers settled their claims for lost or injured live stock; the removal from the live stock cars by the Stock Yard Company of dead animals left therein; the service of notifying the consignees of the arrival of live stock, and the furnishing to the line-haul carriers of terminal facilities for the receipt and delivery of live stock; (8) whether the unloading service was performed by the Stock Yard Company as agent for the line-haul carriers as a part of the transportation service which the line-haul carriers held themselves out in their published tariffs to perform.

After the decision of the Commission in 52 I. C. C. 209, a rehearing was granted; thereafter a great mass of testimony was introduced before the Commission bearing on the question of whether it was the duty of the

shipper or of the carriers to unload live stock at the Union Stock Yards in Chicago. We particularly refer to the hearings of May 20th, May 21st and May 22nd, 1919, shown in Original Ex. 7, referred to on page 269 of the Record. Please see resumé of facts adduced at said hearings, *supra*, pp. 4-5-6.

The finding of the Commission on this question is definite, precise and to the point. That finding is (R. 144):

> "The facts in this case are not in dispute. For more than 50 years carriers delivering live stock at the stockyards in Chicago have loaded and unloaded live stock, and made no charge therefor against the shipper. More than 4,000 cars of live stock are frequently delivered at the stockyards in Chicago on a single day. It is manifest that if the consignees or shippers undertook to unload their inbound shipments, or to load outbound shipments, there would result such confusion and congestion at the stockyards as seriously to interfere with orderly and prompt performance of the service. Counsel for the line-haul carriers conceded at the hearing that the shipper cannot go to the stockyards and physically load or unload his live stock; but their contention is that he should do it financially. Under the regulations of the stockyard company no shipper is permitted to perform the service, even if he should demand the right to do so. The line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for years constituted the through charge and included delivery of live stock to the consignee at the stockyards. For the reasons stated we are of opinion that our finding that it is the duty of the shipper to load and unload live stock in the stockyards at Chicago was error, and it is therefore reversed. And we now find that it was the duty of the carriers to unload and load live stock at that point."

The Circuit Court of Appeals should have respected and accepted this finding of the Commission. No contention is made that the Commission, as to this finding,

acted arbitrarily or without evidence to support its conclusion, or that it transcended its constitutional or statutory powers. Under such circumstances the determination of that question was not subject to review by the Circuit Court of Appeals. (*Standard Oil Co.* v. *United States*, 283 U. S. 235; *Interstate Commerce Commission* v. *Delaware, L. & W. R. R. Co.*, 220 U. S. 235; *United States* v. *Louisville & N. R. R. Co.*, 235 U. S. 314; *Procter & Gamble* v. *United States*, 225 U. S. 282, at pages 296 to 298).

IF THE QUESTION OF THE DUTY TO UNLOAD LIVE STOCK WAS PURELY A QUESTION OF LAW, THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS WAS ERRONEOUS.

In *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, it was specifically held that the duty of unloading live stock consigned to a large terminal market is a duty of the line-haul carrier, inseparably connected with and constituting an integral part of the transportation of live stock; that although that duty may be delegated to an agency or instrumentality, the duty of unloading live stock nevertheless continues primarily to be the duty of the line-haul carrier who undertakes the transportation of live stock to a certain designated station to which the live stock is to be transported.

The contention made by the Stock Yard Company in *United States* v. *Union Stock Yards*, 226 U. S. 286, was that the Stock Yard Company was not subject to the provisions of said Act, because the service which it performed in connection with the transportation of live stock was a service independent of the interstate transportation of live stock and performed wholly within the State of Illinois. This court, however, regardless of the

fact that the "Act to Regulate Commerce" had been in force and effect for many years, adhered to the rule announced in the *Covington Stock Yards* case, 139 U. S. 128; it is clear that the basic reason for holding the Union Stock Yard Company to be a common carrier was that the unloading of live stock is a necessary incident to the interstate shipment of live stock, inseparably connected therewith. If this court in *United States* v. *Union Stock Yard Co.*, 226 U. S. 286, had held, in accordance with the contention of respondents in this case, that the unloading of live stock at the Union Stock Yards was an independent transportation service performed by an independent connecting carrier, then, obviously, it would necessarily have had to hold that the Stock Yard Company was not subject to the provisions of that Act, inasmuch as the service which it performed was rendered entirely in the State of Illinois as a separate and distinct service from the interstate transportation of live stock.

That this court, in *United States* v. *Union Stock Yards*, 226 U. S. 286, considered that the rule laid down in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, to the effect that it was the duty of a carrier of live stock to unload as a part of its engagement to transport live stock, continued to be the law after the enactment of the Act to Regulate Commerce, is clearly shown by the following language (p. 304):

> "That the service is performed wholly in one State can make no difference if it is a part of interstate carriage. 'The transportation of live stock,' said this court in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 136, in treating of the duties of common carriers, irrespective of the Act to Regulate Commerce, 'begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignees.'"

That it is the understanding of the courts generally that the rule laid down by this court in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, still applies to a line-haul carrier of live stock regardless of the enactment of the Act to Regulate Commerce, is indicated in *Burton* v. *Wabash Railway Co.*, (Circuit Court of Appeals, Missouri) 22 S. W. Rep. (2d Ser.) 201. There the court says on page 204:

> "It is not required to own and operate such yards itself, but may delegate that duty to another, but neither it or any one to whom it may delegate the duty may make an extra charge for merely receiving or delivering the stock in and through such yards."

Citing *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128; U. S. C. A. Title 49, Sec. 15, Par. 5.

In *Panhandle & S. F. Ry. Co.* v. *Phillips*, (Court of Civil Appeals, Texas) 197 S. W. Rep. 1031, it appears that the stock pens at Kansas City are owned and operated by the Kansas City Stock Yards Company, an independent corporation, and that the stock upon arrival at Kansas City is handled in a method similar to the handling of live stock at the Union Stock Yards in Chicago. There the court, in referring to the duty of the line-haul carrier to unload live stock at said yards, says:

> "This duty is a part of the 'transportation,' and is therefore non-delegable, and if the carrier employs independent agents to perform it, the liability remains the same. Section 1, Interstate Commerce Act (Section 8563 (2), West Publishing Company's Compiled Statutes of United States, Vol. 8, p. 9061); *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73; *Missouri Pacific Railway Co.* v. *Haynes*, 72 Tex. 175, 10 S. W. 398; Hutchinson on Carriers, par. 510."

In *Panhandle & S. F. Ry. Co.* v. *Crawford*, (Court of Civil Appeals, Texas) 198 S. W. 1079, the court, in re-

ferring to the unloading service by the Kansas City Stock Yards Company, an independent corporation, on page 1081 says:

> "The duty of the railway company to make delivery of the shipment at Kansas City, and in order to do this furnish the facilities necessary for the unloading and delivery of the cattle, is a part of the 'transportation' of an interstate shipment under Section 1 (2) of the Interstate Commerce Act, • • •.
>
> "This duty is non-delegable, and, if other agents are employed by the carrier to perform it, the liability would remain the same. Section 1, Interstate Commerce Act; Section 8563 (2), West Publishing Company's Compiled Statutes of the U. S., Vol. 8, p. 9061; *Covington Stock Yards Co.* v. *Keith,* 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73; *Missouri Pacific Ry. Co.* v. *Haynes,* 72 Tex. 175, 10 S. W. 398."

THE "ACT TO REGULATE COMMERCE" DID NOT ABROGATE THE PERFORMANCE BY THE CARRIER OF ANY DUTY WHICH AT COMMON LAW IT OWED THE SHIPPER OR THE PUBLIC.

We contend that the Act admits of no construction relieving the carrier from any duty or obligation connected with the transportation of live stock to the Union Stock Yards, Chicago. The "Act to Regulate Commerce" was enacted for the benefit and in behalf of the shippers and in furtherance of their rights. It was not intended to impair or destroy any duty which at the common law it was the duty of the carrier to perform. There is nothing in the provisions of the Act to Regulate Commerce, directly or indirectly, changing or modifying the common law as laid down in the *Covington Stock Yards* case. The line-haul carrier may, if it chooses, provide its own facilities for unloading live stock itself, or it may, if it chooses, select an independent corporate en-

tity, such as the Stock Yard Company, to perform the unloading service as its agent or instrumentality. *In either case it must in its own published tariffs provide, either in its line-haul rates or in a separate terminal charge, for the complete transportation of live stock, including the unloading service.* If after such tariff is filed changes occur which increase or decrease the cost to the carrier of such terminal service, the line-haul carrier must, if it desires to increase the cost of the transportation transaction to the shipper, show such change in its own tariffs. (Par. 3, Sec. 6, Act to Regulate Commerce.) If it does not do so it will be presumed to have waived the right to pass the increase on to the shipper. (*Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98.)

The opinion of the Circuit Court of Appeals assumes that because the Stock Yard Company is, under the Act, a common carrier, that any service which it performs with reference to the transportation of live stock is in legal contemplation performed by the Stock Yard Company for the shipper, and that the shipper is therefore obliged to look to the separate published tariffs of each and all of the common carriers who render any part of the service connected with the transportation of his property in order to ascertain what the cost of the entire transportation service shall be. The fact that the Stock Yard Company is an independent corporate entity and subject to the provisions of the Act to Regulate Commerce does not mean that the terminal service performed by it is independent of the complete transportation service which the line-haul carriers in their published tariffs hold themselves out to perform. *It is the nature and character of the service which is the important consideration.* (*United States* v. *Union Stock Yard*,

226 U. S. 286, at p. 304.) *It is important to keep in mind that while the Stock Yard Company was a separate independent corporate entity from that of the line-haul carriers, the service which it performed in the unloading of live stock was not separate and independent of the transportation service of the line-haul carriers, but was inseparably connected therewith.* (See *United States* v. *Union Stock Yard*, 226 U. S. 286.) It merely confuses the issue to say that the Stock Yard Company was an independent corporate entity, itself subject to the provisions of the Act to Regulate Commerce, because whether or not the agency or instrumentality which performs the terminal service is or is not a common carrier, and is or is not subject to the provisions of the Interstate Commerce Act, the nature and character of the service which it performs is essentially the same. If, as seems to be conceded, the Stock Yard Company, before the enactment of the Act to Regulate Commerce, in performing the unloading service, acted as the agent for the line-haul carriers, it is obvious that in performing the identical service after the enactment of the Act to Regulate Commerce its relationship as agent to the line-haul carriers in the performance of that service did not cease.

That a line-haul carrier may, since the enactment of the Act to Regulate Commerce, lawfully employ agents to perform for it and in its behalf a terminal service connected with the through transportation of property under through rates and charges provided by the initial carrier, is shown by the decision of this court in the Arbuckle case (*United States* v. *Baltimore & Ohio Ry. Co.*, 231 U. S. 274) and in *Warehouse Co.* v. *United States*, 283 U. S. 501.

This court, in the latter case, on page 506, says:

> "We may assume that railroads, in order to carry on their business as interstate carriers, are not bound to maintain their own freight stations, but may contract with others to supply them and to perform there the transportation services which they are under a duty to perform."

EVEN IF IT HAD NOT BEEN THE POSITIVE AND ABSOLUTE COMMON LAW OR STATUTORY DUTY OF THE LINE-HAUL CARRIERS TO UNLOAD LIVE STOCK CONSIGNED TO THE UNION STOCK YARDS, CHICAGO, WHEN THE LINE-HAUL CARRIERS IN THEIR PUBLISHED TARIFFS HELD THEMSELVES OUT TO PERFORM THE COMPLETE TRANSPORTATION SERVICE, INCLUDING THE UNLOADING OF LIVE STOCK AND PROVIDED DEFINITE THROUGH LINE-HAUL RATES AND A DEFINITE TERMINAL CHARGE COVERING COMPENSATION TO THEMSELVES FOR THE UNLOADING SERVICE, SUCH DUTY AND ALL OF ITS RESPONSIBILITIES BECAME THAT OF THE LINE-HAUL CARRIERS.

Regardless of whether or not, as a general proposition of law, it was the duty of a line-haul carrier, either before or after the enactment of the Act to Regulate Commerce, to unload live stock at a primary market such as the Union Stock Yards in Chicago, it is obvious that where a line-haul carrier actually assumes that obligation and in its published tariffs provides a definite through line-haul rate plus a definite $2.00 terminal charge covering compensation to itself for that service, its duty as to that service thereupon becomes absolute and it must provide full and complete instrumentalities for the performance of that service, as well as complete rates and charges covering that service. It is equally obvious that where such line-haul carrier once commits itself to the duty of performing such unloading service,

it cannot abandon the performance of that duty or throw any part of that duty on the shipper without first changing its published tariffs so as to plainly indicate to the shipper the part of such duty or service, or compensation therefor, which the carrier has abandoned.

That the line-haul carriers in their published tariffs established a fixed commodity or line-haul rate for live stock consigned to the Union Stock Yards is clearly shown by the testimony of H. W. Beyers, Assistant Freight Traffic Manager, Chicago & North Western Railroad, (Original Ex. 7, pp. 1249-1252; Certified Excerpts from Original Exhibits, pp. 171-172), where he testified that under the published tariffs of the line-haul carriers the shipper was advised that in the shipment of his live stock to the Chicago market the sole and only charges for such shipments would be "the flat Chicago rate plus $2.00 per car terminal charge that the carrier has indicated will pay the charges of the Union Stock Yard & Transit Company for loading and unloading." The fact that the flat Chicago rate plus $2.00 per car terminal charge was made by the published tariffs of the line-haul carriers the only charge against the shipper for the complete transportation of his live stock to the Union Stock Yards, Chicago, including the unloading thereof, was not controverted before the Interstate Commerce Commission, in the District Court, or in the Circuit Court of Appeals.

The finding of the Commission on this subject is precise, definite and conclusive. The Commission found (R. 144):

> *"The line-haul rates to Chicago plus a charge of $2.00 for terminal or switching service have for years constituted the through charge and included delivery of live stock to the consignee at the stock yards."*

It must be remembered that the line-haul rates to the Union Stock Yards in Chicago and the $2.00 per car terminal charge are, except as said line-haul rates were horizontally raised, as hereinafter set forth, the same line-haul rates and terminal charge involved in the case of *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy Railroad Co.*, 186 U. S. 320, and later in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98. In the former case, referring to the line-haul rates and terminal charge on shipments of live stock consigned to the Union Stock Yards in Chicago, it is said, page 336:

> *"There is also no room for question that during the many years these rate sheets were in force the carriers, under their contracts to carry to Chicago, delivered carloads of cattle to the stock yards without making any charge other than that which was specified in the through rate."*

In the opinion in *Interstate Commerce Commission* v. *Chicago, Burlington and Quincy Railroad Company*, 186 U. S. 320, attention is specifically directed (p. 327) to the fact that said $2.00 terminal charge included the trackage charge and cost of unloading. The same $2.00 terminal charge was again before this court in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, in which case in the opinion (p. 108) it also appears that the charge of the line-haul carriers for unloading live stock at the Yards was included in the $2.00 terminal charge. The $2.00 terminal charge involved in *Interstate Commerce Commission* v. *Chicago Burlington & Quincy R. R. Co.*, 186 U. S. 320, and in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, is the identical $2.00 terminal charge referred to by the Commission in this case in its order (R. 144).

Mr. H. W. Beyers, a traffic expert called in behalf of

the line-haul carriers at the hearing before the Commission in this case, testified as follows:

"A. I understand the $2.00 terminal charge to include the 25 cents for unloading."

(Certified Excerpts from Original Exhibits, p. 46; Original Ex. 6, pp. 511-512.)

The same traffic expert further testified in behalf of respondents at the hearing before the Commission:

"Q. Was the absorption of 25 cents unloading charge considered in fixing the price of $2.00 to be plussed on the Chicago rate? A. I so understood it, yes.

Q. When the original charge of $2.00 was made it included the unloading charge? A. The 25 cents; that is my understanding. * * * And if your (meaning Stock Yard Company) tariff had called for 50 cents at that time I take it the terminal charge would have been $2.25. It was a matter of tariff construction." (Explanation in parenthesis supplied.)

(Original Ex. 7, p. 1271.)

Again referring to the service of unloading, the same expert testified:

"Q. Would it not be true then that the service has been charged in the general rate to Chicago irrespective of this $2.00 charge which was put in to cover this proposed extra expense of trackage?

A. That is the situation."

(Original Ex. 7, p. 1284.)

Mr. Beyers further testified in referring to the reason why the line-haul carriers always paid the Stock Yard Company for the unloading of live stock at the Union Stock Yards (Certified Excerpts from Original Exhibits, pp. 50-51):

"Mr. Cowan: Q. Why did you pay for it if it was not your business to do it?

Mr. Beyers: A. Well, it is the terminal charge, Judge."

It has never been held by this court, or any other court, except the Circuit Court of Appeals in the instant case, that where a line-haul carrier in its published tariffs undertakes the complete transportation of property from the point of origin of the shipment to the point of destination, and for such complete service provides definite through rates and charges, there can be exacted from the shipper, either by the line-haul carrier or anyone else, an additional charge over and above the through charge specified in the published tariffs of the line-haul carrier merely because some other carrier down the line between the point of origin of the shipment and the point of destination has filed new published tariffs increasing to the line-haul carrier its charges for an incidental service which it performs for the line-haul carrier to enable it to carry out its contract for complete transportation with the shipper.

Paragraph 3 of Section 1 of the "Act to regulate Commerce" provides:

> "The term 'transportation', as used in this chapter, shall include locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage, *irrespective of ownership, or of any contract, express or implied, for the use thereof, and all services* in connection with the receipt, delivery * * * and handling of property transported." (Italics ours.)

Paragraph 7 of Section 6 of the Act provides:

> "No carrier * * * shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any services in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time;" * * *.

Paragraph 3 of Section 6 of the Act provides:

> "No change shall be made in the rates, fares and

charges, or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares or charges will go into effect."

It is obvious from a reading of the above provisions of the Act that where a line-haul carrier in its published tariffs undertakes to transport property between different points on its own route or between points on its own route and points on the route of some other carrier, and publishes a through charge for the performance of that complete service, any change which affects or disrupts the right of the shipper must be shown by a corresponding change in the published tariffs of the line-haul carrier holding itself out to perform the entire transportation service for a through rate or charge. It is equally obvious that such change or disruption of the right of the shipper cannot be made on the basis of the published tariffs of some other carrier. If a shipper was compelled to take notice of increases made in the charges of various agencies performing terminal services and the like for a line-haul carrier who undertakes the complete transportation of the property for a through rate or charge, then the object and purpose of the Act would not be attained and much uncertainty and confusion would exist. *If the tariff schedules of the common carrier performing some terminal or accessorial service for a line-haul carrier automatically affected the through transportation charge in the published tariffs of the line-haul carrier so that the shipper would be bound to pay the amount of an increase in the charges of the carrier performing such terminal or accessorial service for the line-haul carrier in*

addition to the through rate or charge contained in the published tariffs of the line-haul carrier, then logically a decrease in the charges in the published tariffs of such terminal or accessorial carrier would automatically reduce the amount which the shipper was required to pay under the through rate or charge set up in the published tariffs of the line-haul carriers. Such a condition would produce confusion and uncertainty and a situation which could not be tolerated.

For this reason alone the Commission was fully justified in condemning as unlawful the practice in question.

The matter of the form, contents and method of handling rates and rate schedules has been entrusted by the Act to Regulate Commerce to the Interstate Commerce Commission. That clearly is an administrative matter.

It is not consistent with the object, purpose, spirit and intent of the Act to Regulate Commerce that where the initial common carrier undertakes the complete transportation of live stock for a through rate or charge specified in its published tariffs, the rights of the shipper growing out of said through rate may be reduced or prejudiced by conditions imposed by another common carrier performing some part of the entire transportation service undertaken by the initial carrier. While probably not directly in point, the case of *Missouri, K. & T. Ry. Co.* v. *Ward*, 244 U. S. 383, shows the general intent of the Act to Regulate Commerce, as amended, not to allow another carrier to interfere with the contract rights of the shipper growing out of his contract with the initial carrier. The court in that case, on page 386, says:

> "The purpose of the Carmack amendment has been frequently considered by this court. It was to create in the initial carrier unity of responsibility for the transportation to destination. * * * The

bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not altered by the second issued by the connecting carrier. As appellants were already bound to transport cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void."

IV.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE SO-CALLED CLASSIFICATIONS IN THE PUBLISHED TARIFFS OF THE LINE-HAUL CARRIERS AND THE SO-CALLED ABSORPTION CLAUSE IN SAID PUBLISHED TARIFFS CONSTITUTED THE EXTENT OF THE OBLIGATION OF THE LINE-HAUL CARRIERS WITH REFERENCE TO SAID UNLOADING CHARGE. FURTHERMORE, THAT COURT IMPROPERLY CONSTRUED THE MEANING, FORCE AND EFFECT OF THE SO-CALLED ABSORPTION CLAUSE.

Here, again, the determination of the question as to whether or not the so-called absorption clause in the published tariffs of the line-haul carriers constituted the limit and extent of the obligation of the line-haul carriers with reference to said unloading service was inseparably bound up with the determination of questions of fact enumerated in the preceding sections of this argument.

Contrary to the contention of counsel for respondents, the published tariffs of the line-haul carriers and of the StockYard Company were not simple. The tariffs filed by the line-haul carriers and the Stock Yard Company in this case were voluminous and complicated and of such a nature as to call for expert knowledge as to their meaning, force and effect, in addition to an investigation as to the various facts relative to the history of said unloading charge, the actual relationship between the line-haul car-

riers and the Stock Yard Company with reference to the performance of that service, the established custom and usage of the line-haul carriers, the Stock Yard Company and the shippers with reference to the unloading services and manner of handling the charges therefor, together with the important other facts and circumstances referred to in the preceding subdivision of this argument.

What was said by this court in *Standard Oil Co.* v. *United States,* 283 U. S. 235, at page 236, and in *Standard Oil Co.* v. *United States,* 41 Fed. Rep. (2d) 836, at page 841, is particularly appropriate here. In the latter case it is said:

> "While questions of tariff interpretation may in some instances involve purely a question of law, in many instances such interpretation involves preliminary determination of facts which must be made before a court can assume jurisdiction, and in such instances resort must first be had to the Commission. * * * Whether the Commission, the shippers, and the respondent carriers had, by uninterrupted usage and custom, adopted a construction and application of the intermediate rule utterly inconsistent with respondent carriers' present contention, was a question of fact to be determined by the Commission, and in that determination it was exercising an administrative function and not one purely judicial."

This court, in affirming the District Court, says in *Standard Oil Co.* v. *United States,* 283 U. S. 235, at page 236:

> "The case before the Commission did not, as contended, involve merely a construction of the written words employed in a rate tariff—a simple question of law; but it required consideration of matters of fact and application of expert knowledge for the ascertainment of the technical meaning of words and a correct appreciation of a variety of incidents effecting their use."

But if the Circuit Court of Appeals had the right in

this case to substitute its judgment for that of the Commission on this question, that court was clearly wrong in coming to its conclusion on this phase of the case. We may concede, for the purpose of this argument, that the provisions of Official Classification No. 44 and of Western Classification No. 54, providing, "the consignor and consignee are responsible for the loading and unloading of the same, the carrier assuming no liability whatever in regard to the loading and unloading," did apply to outlying intermediate stations and to stations not specifically enumerated in the published tariffs. These classifications, however, never applied to shipments of live stock consigned to the Union Stock Yards in Chicago, because as to that particular station the published tariffs specifically provided a definite through base rate or commodity charge, plus a $2.00 per car terminal charge, and included the unloading service. (See specific finding of the Commission on this subject, R. 144; also testimony of respondent's witness Beyers, Certified Excerpts from Original Exhibits, p. 117; see also Certified Excerpts from Original Exhibits, pp. 167-169.)

In *Galveston, etc. Ry. Co.* v. *Lykes Bros.*, 294 Fed. Rep. 968, the court on page 971, says:

> *"it is a matter too well settled by the rules of the Commission, affirmed by the courts, that where a commodity rate is made in the tariff such commodity rate is the lawful rate and the only rate that can be used; the class rates are by it superseded."* (Italics ours.)

It seems absurd to contend that where, as in this case, the line-haul carriers in their published tariffs had established a definite flat Chicago rate, plus a $2.00 per car terminal charge, for the transportation of live stock consigned to the Union Stock Yards in Chicago, and in said line-haul or commodity charge plus the terminal charge admittedly included compensation to themselves for the

unloading service, the official classifications in the publisher tariffs, making it the absolute duty of the shipper and consignee to pay the entire expense of loading and unloading live stock, could have any application.

The conclusion reached by the Circuit Court of Appeals that the provisions of the official classification applied to shipments made to the Union Stock Yards, Chicago ignores the fact that the published tariffs of the line-haul carriers make complete provision for two separate and distinct classes of cases:

1. Where, as in the case of shipments to the Union Stock Yards at Chicago, the line-haul carriers held themselves out to the public to furnish complete transportation of live stock to the point of destination, including delivery, and in their published rates and charges included compensation for such unloading service;

2. In other cases where the line-haul carriers did not hold themselves out to the public as furnishing such complete transportation service, and where their published rates and charges did not include compensation for the unloading service.

It also ignores the finding of fact by the Commission that the line-haul rates to Union Stock Yards, Chicago, plus the $2.00 per car terminal charge, has for years constituted the through charge including unloading.

THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS THAT THE SO-CALLED ABSORPTION CLAUSE LIMITED ALL OBLIGATION OF THE LINE-HAUL CARRIERS TO THE PRECISE NUMBER OF CENTS MENTIONED THEREIN, WAS ERROR.

Here, again, the meaning of the language of the absorption clause is inseparably connected with the consideration of voluminous and complicated tariff sched-

ules and the necessary determination of facts with reference to the history of said unloading charge, the established custom and usage with reference thereto, and the nature and extent of the various services covered by the so-called loading and unloading charge. Therefore, on this question also the Circuit Court of Appeals should have accepted the finding of the Commission. (R. 144). (*Standard Oil Co.* v. *United States,* 283 U. S. 235; *Illinois Central R. R.* v. *Interstate Commerce Commission,* 206 U. S. 441, at 454; *Great Northern Ry.* v. *Merchants Elevator Co.,* 259 U. S. 285.)

(Note: The tariffs filed by the line-haul carriers and the Stock Yard Company in this case were voluminous and complicated and of such a nature as to call for expert knowledge as to their meaning, force and effect. Such tariffs are set forth in Original Exhibit 1, certified to this court, a few excerpts from the same being included in Certified Excerpts from Original Exhibits, pp. 165, 167, 169 and 172. The absorption clause referred to in the opinion of the Circuit Court of Appeals was not, as might be inferred from the opinion of the Circuit Court of Appeals, new but was contained in the published tariffs of the line-haul carriers ever since the Act to Regulate Commerce was enacted.)

PRESENCE OF ABSORPTION CLAUSE GAVE TARIFFS OF LINE-HAUL CARRIERS LEGAL EFFECT OF A JOINT RATE SO FAR AS RIGHTS OF SHIPPER WERE CONCERNED.

The rule is well established by the Commission that in every case in which the initial carrier in its published tariffs provides that it will assume or absorb terminal charges, switching charges of connecting lines, and the like, the effect thereof is to establish a joint rate. In

National Dock Co. v. *B. & M. R. R.*, 38 I. C. C. 643, at page 650, the Commission says: "So far as the shipping public is concerned, the effect of a switching absorption is to establish a joint rate." (See also *New York Lumber Co.* v. *St. L. M. & S.*, 21 I. C. C. 304.) The Commission has also held that the cancellation by the initial carrier of absorption charges which it has theretofore assumed disrupts a joint rate and the carrier must justify such cancellation by showing that the same is justified. (*Cincinnati Switching Absorption*, 44 I. C. C. 353, at page 354.)

It necessarily follows that even if the Circuit Court of Appeals was right in holding that the provisions of the so-called absorption clause limited the liability of the line-haul carrier to contribute to the expense of the unloading service, nevertheless, before any part of the expense of the unloading service could be lawfully imposed on the shipper, it would have been necessary for the line-haul carriers to have amended, in the manner required by paragraph 3 of Section 6 of the Act to Regulate Commerce.

ENUMERATION OF SPECIFIC NUMBER OF CENTS PER CAR IN THE ABSORPTION CLAUSE WAS NOT INTENDED TO LIMIT THE DUTY OF THE CARRIER WITH REFERENCE TO UNLOADING CHARGE.

Even if the Circuit Court of Appeals had been warranted in substituting its judgment on this question for that of the Commission, the Court was clearly wrong in its conclusion. The language of the so-called absorption clause (R. 253) must be construed in the light of the facts and circumstances existing at the time said absorption clause was included in the published tariffs of the line-haul carriers. The so-called absorption clause was

not new at the time it was inserted in the so-called Lowrey Tariff. Ever since the line-haul carriers published their rates and charges the same kind of an absorption clause was contained in their published tariffs. At the time the absorption clause was included in the original published tariffs of the line-haul carriers, and at the time they were merely continued in the Lowrey Tariff, the total amount of the loading charge of the Stock Yard Company to the line-haul carriers was 50 cents per car, and the entire amount of the unloading charge was 25 cents per car. The particular enumeration of the respective amounts of such loading and unloading charges in such absorption clause was merely descriptive of such charges and not inserted as a limitation of the amount of such charges which the line-haul carriers would pay. *The outstanding idea of the absorption clause was that the carriers would pay the Stock Yard Company for loading and unloading.* The mention of the particular number of cents per car was merely incidental or explanatory of the major premise of the absorption clause, viz: that the unloading service would be performed by the Stock Yard Company and paid for by the line-haul carriers without expense to the shipper other than as included in the flat Chicago rate plus the $2.00 per car terminal charge.

It is elementary that the meaning, force and effect of any written instrument is to be ascertained from the intent manifested and the facts and circumstances existing at the time of its execution. Its meaning, force and effect cannot be made to vacillate with each subsequent change in circumstances. If, when the published tariffs of the line-haul carriers were formulated and filed, it was the intent of such tariffs that the line-haul carriers would assume the entire expense connected with the un-

loading of live stock, the same tariffs,—after the Stock Yard Company had filed its new tariff showing an increase against the line-haul carriers for the unloading service, did not mean that the line-haul carriers would pay only a part of the expense connected with such unloading service. The absorption clause neither added nor detracted from the service specified in the published tariffs of the line-haul carriers, or from the rates and charges specified in said tariffs for that service. Without any absorption clause in said published tariffs, the obligation of the line-haul carriers would have been the same as with it.

PROVISIONS OF PUBLISHED TARIFFS MUST BE CONSTRUED MOST STRONGLY AGAINST THE CARRIER AND IN FAVOR OF THE SHIPPER.

The rule is well established that the tariffs prepared and filed by the carrier must be construed most strongly against the carrier and in favor of the shipper. (*Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, at page 105; *Southern Pacific Co.* v. *Lothrop*, 15 Fed. (2d) 486; *Sutherland Flour Mills Co.* v. *Director General*, 81 I. C. C. 365; *N. W. Steel Co.* v. *Director General*, 68 I. C. C. 195; *Pacific Rice Mills Co.* v. *Director General*, 78 I. C. C. 459.)

The case of *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, is directly in point. There the court, on page 105, says:

> "The carrier is under no obligations to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and commission that it is insisting upon it."

The carrier in preparing such tariff schedules selects its own language to express the intent of such tariffs,—the shipper has no voice in the matter. Furthermore, one of the objects and purposes of the enactment of the Act to Regulate Commerce was to guard and protect the rights and interests of the shipper as against the carrier. When we add to these considerations the undisputed facts with reference to the history of the unloading charge, the custom and usage of the line-haul carriers, the Stock Yard Company and the shippers, relative to the performance of that service and the payment therefor, the relationship between the Stock Yard Company and the line-haul carriers, and other facts which throw light on the subject, it is manifest that the so-called absorption clause cannot be construed as limiting the entire obligation of the line-haul carriers with reference to said unloading service to the particular number of cents set forth in said so-called absorption clause.

V.

THE STOCK YARD COMPANY, IN PERFORMING THE LOADING AND UNLOADING SERVICE, DID NOT OCCUPY A POSITION ANALOGOUS TO THAT OF AN INDEPENDENT CONNECTING CARRIER TRANSPORTING PROPERTY ON ITS OWN LINE FOR A PART OF THE DISTANCE COVERED BY THE SHIPMENT.

The crux of the contention of counsel for respondents, sustained by the Circuit Court of Appeals, is that in performing the loading and unloading service the Stock Yard Company acted as an independent common carrier, with its own tariffs, and was a connecting carrier to the line-haul carriers, just as another railroad with its separate tariffs in cases of shipments beginning on one road and ending on the other.

If the line-haul carriers in their published tariffs had restricted the transportation service to be performed by them and the charges to be made for such service to the mere carriage of the live stock on their rails, and the Stock Yard Company had held itself out to the public as performing the unloading service for and on behalf of the public for certain rates and charges specified in its tariffs for the performance of such service, then the position taken by respondents would, at least, have been logical; but where, as in this case, as found by the Commission, the line-haul carriers for more than 50 years delivered live stock at the Stock Yards in Chicago, loading and unloading the same, and making no charge therefor against the shipper, and in their published tariffs held themselves out to the public as performing the entire transportation transaction, including the unloading of such live stock at the Union Stock Yards, in consideration of a through charge consisting of their line-haul rates and a $2.00 per car terminal charge, how is it possible for respondents, with sincerity, to contend that the relationship of the Stock Yard Company and the line-haul carriers in the transportation transactions in question was just the same as the relationship existing between an independent originating common carrier and an independent connecting common carrier in cases of shipments beginning on one road and ending on the other?

To say that the Stock Yard Company in the transactions in question was an independent common carrier is to entirely lose sight of the facts with reference to the nature and character of the service performed by it and the capacity in which it rendered the same. The Stock Yard Company was an agency selected by the line-haul carriers to unload live stock. The history of the Stock

Yard Company shows that it was created and organized by the line-haul carriers for the express purposes of loading and unloading live stock consigned to and from the Chicago Stock Yards over the lines of the line-haul carriers (R. 123-124; see also *Interstate Commerce Commission* v. *Chicago, etc. R. R. Co.*, 186 U. S. 320.) The service performed by the Yard Company was a transportation service only in the sense that it was essentially and inherently a part of the transportation of live stock which the line-haul carriers in their published tariffs held themselves out to the public to perform. Separated from the transportation of live stock by the line-haul carriers, neither the Stock Yard Company nor the service it performed had cause for existence. It was a matter of no concern to the shipper whether the line-haul carrier did its own unloading or employed some other agency to perform that service.

NO PROPER PLACE HERE FOR TECHNICALLY JOINT RATES.

In this connection it is contended by respondents that the rates contained in the published tariffs of the line-haul carriers were not the joint rates of the line-haul carriers and of the Stock Yard Company. We admit that the published rates of the line-haul carriers were not technically joint rates of the line-haul carriers and of the Stock Yard Company in the sense that written concurrence in such rates was filed by the Stock Yard Company. The situation did not necessitate or require a joint rate being established by the line-haul carriers and the Stock Yard Company because the undertaking in the published tariffs of the line-haul carriers contemplated complete through transportation service of the live stock, including the unloading thereof, and contem-

plated that the line-haul carriers would furnish, for the through rates and charges therein specified, all facilities and instrumentalities necessary for the complete transportation service, including unloading. Where a given transportation service set forth in the published tariffs of a line-haul carrier contemplates that the service for which the shipper contracts shall be rendered in part over the lines of the originating carrier and in part over the lines of another common carrier, joint rates covering the combined services of the two carriers are usual and proper; but where, as in this case, the published tariffs of the line-haul carriers covered the complete through transportation of the live stock, including the unloading thereof, there was no occasion for a joint rate between the line-haul carriers and the Stock Yard Company. The Union Stock Yards was specifically named in the tariffs of the line-haul carriers as a terminal station to which the base rates or line-haul rates of the line-haul carriers and the $2.00 per car terminal charge applied. (Excerpts from Or. Ex. 167-171-172.) In addition the Commission in this case found that the loading platforms of the Stock Yard Company were, in effect, terminals of the line-haul carriers using the facilities of the Stock Yard Company (R. 134, 135, 139, 145). That finding of fact by the Commission was supported by ample evidence, and is not subject to review by the courts. The line-haul carriers also proceeded on the theory that the payment of the trackage charge to the Junction Company and the payment by it of the charges of the Stock Yard Company in effect made the facilities of the Junction Company and of the Stock Yard Company, to all intents and purposes, their own facilities, to be controlled by their own tariffs, in accordance with the definition of the

term "transportation" as used in Paragraph 3, Section 1 of the Act to Regulate Commerce, which provides:

> "The term 'transportation' as used in this section shall include * * * all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof."

CLEAR INTENT OF PUBLISHED TARIFF OF STOCK YARD COMPANY WAS TO RESTRICT THE APPLICATION OF ITS RATES AND CHARGES TO THE LINE-HAUL CARRIERS FOR WHOM IT PERFORMED THE UNLOADING SERVICE AS AGENT.

The clear intent of the tariff schedules filed by the Stock Yard Company on May 21, 1917, was that the charges therein contained for the unloading service were made solely against the line-haul carriers for a service performed by the Stock Yard Company as agent for the line-haul carriers and with the intention of not in any manner affecting the rights of the shipper.

The language of the Stock Yard Company's published tariffs of May 21, 1917, "the charge made by this company for the service (as a carrier's agent) of loading and unloading live stock at the Union Stock Yards at Chicago, Illinois," cannot be disregarded. The application of the rates and charges contained in said published tariffs must be confined to the limits expressly provided for in said tariffs. That it was the intent of the Stock Yard Company, in phrasing the same, to confine its force and effect to the line-haul carriers to the exclusion of the shipper, was frankly admitted by the Stock Yard Company at various hearings before the Commission. (R. 250-251; Original Ex. 6, pp. 316-341; Certified Excerpts from Original Exhibits, pp. 21-36.)

Manifestly, a tariff containing rates and charges to be paid by the line-haul carriers for whom the Stock Yard Company as agent performed the unloading service, could not justify the collection of all or any part of such charges from the shipper or consignee,—especially in view of the fact that the through line-haul rates and the $2.00 per car terminal charge in the published tariffs of the line-haul carriers already included every transportation service incident to the complete transportation and delivery of live stock into suitable pens at the Union Stock Yards, Chicago.

Although not of controlling importance, the record clearly shows that the controverted charges in question were collected by the Stock Yard Company as the collecting agent of the line-haul carriers.

The conclusion of the Circuit Court of Appeals that the Stock Yard Company in effect collected the 25 cents per car in question from the shipper, is directly refuted by the answer filed in the District Court in this case by the Stock Yard Company, where, in referring to the collection by the Stock Yard Company from the commission merchants at the Union Stock Yards, it is said (R. 22-23):

> "In every instance said service was performed by this defendant for and on behalf of the railroad from which said charge was collected, and that in no instance was said charge collected by this defendant from the shipper or consignee of any shipments * * *; that during the times referred to in the petition filed herein, it was acting as the agent of the railroad or line-haul carriers hauling said shipments into or out of said yards."

RESPONDENT, STOCK YARD COMPANY, ADMITS THAT IN PERFORMING UNLOADING SERVICE IT ACTED AS AGENT FOR THE LINE-HAUL CARRIERS; AND THAT ITS TARIFFS OF RATES AND CHARGES WERE INTENDED TO BE RESTRICTED TO LINE-HAUL CARRIERS.

The respondent Stock Yard Company does not in this court attempt to stultify itself by denying that it performed the loading and unloading service in question for and on behalf of the line-haul carriers and as their agent, or that it did not collect the charges in controversy from petitioners as their agent. In its brief, filed in opposition to the petition for a writ of certiorari herein, on page 15 it is said:

> "We do not concede that the Stock Yard Company was then or is now performing a common carrier service on its own behalf in loading and unloading live stock at the Stock Yards, but the Commission held it was."

The statement that the Commission held that the Stock Yard Company performed the loading and unloading service "on its own behalf" is a misinterpretation of the Commission's decision. While the Commission held that the Stock Yard Company, because of the nature and character of the service which it performed in connection with the interstate transportation of live stock by the line-haul carriers, was a common carrier subject to the provisions of the Act to Regulate Commerce, it did not hold that the Stock Yard Company was performing the service of loading and unloading live stock at the Stock Yards *on its own behalf*. On the contrary, the Commision, in its various findings and reports, clearly indicates that the Stock Yard Company, in performing the loading and unloading service at the Stock Yards, was not acting in its

own behalf as an independent common carrier, but that it was performing a terminal service inseparably connected with the duty undertaken by the line-haul carriers in transporting live stock to the Union Stock Yards under through rates and charges, including delivery.

Counsel for respondent Director General in their brief in opposition to the petition for a writ of certiorari, say that the answer and contention of the Stock Yard Company, that it performed the loading and unloading service for and on behalf of the line-haul carriers, and as their agent, was only made for the purpose of sustaining its contention that it was not a common carrier.

We assume that neither counsel for the Stock Yard Company, nor counsel for the Director General, mean that Stock Yard Company in so specifically stating in its answer and in so contending the facts to be, misrepresented the truth as to the relationship between itself and the line-haul carriers. Regardless of the particular contention which it was the intent of the portions of the answer of the Stock Yard Company above referred to to support, the fact remains that the Stock Yard Company, in its answer filed in the District Court, and in the position taken by it before the Commission, represented to the court and to the Commission, respectively, that in performing said loading and unloading service, and in collecting the charges therefor, it at all times was acting for and on behalf of the line-haul carriers, and as their agent.

RECORD CONCLUSIVELY SHOWS STOCK YARD COMPANY ACTED AS AGENT OF LINE-HAUL CARRIERS.

Nor is there the slightest question in this case that the Stock Yard Company, in formulating and filing its published tariffs, intended to make the services and the

rates and charges therein applicable solely to the line-haul carriers for whom for more than a half century they had performed the unloading service and by whom, during all of that time, they were paid. (R. 250-251; Original Exhibit 6, pp. 316-394; Certified Excerpts from Original Exhibits, pp. 21 to 36 and 54 to 58).

Mr. Henkle, the General Manager of the Stock Yard Company, testified: (Cert. Excerpts from Orig. Exhibits page 21)

> "Q. Does the Stock Yard Company act as the collecting agent for the delivering carriers in collecting the freight charge from the consignees on the live stock handled at the Union Stock Yards?
> "A. Yes, sir."

Mr. Henkle further testified: (Cert. Excerpts from Orig. Exhibits page 83)

> "Q. Well, you publish a tariff don't you in which you say you make a collection as agents of the carriers for all of this business?
> "A. Yes sir.
> "Q. Is that your understanding that this is a charge that is due you from the carriers for the service that you perform for the carriers?
> "A. The carriers for more than half a century paid us for it so we concluded we were doing it for them."

W. H. Beyers, Assistant Freight Traffic Manager Chicago & North Western Railroad, and one of the principal witnesses in the case, called as a witness for the respondents line-haul carriers, testified, when being examined by Mr. Shaw, counsel for the Stock Yard Company, (Cert. Excerpts from Orig. Exhibits pages 46 and 47):

> "Q. I mean that while at Chicago you have performed the service of loading and unloading since 1865. At these small places in the country where there may be a small chute or private switch track you have never done it?
> "A. No sir.

"Q. You have always done it here?

"A. No sir, you did (meaning the Stock Yard Company) and we paid you for it." (Explanation in parenthesis ours.)

That it was the intent of the Stock Yard Company in filing its new tariff schedules of May 21, 1917 increasing its loading and unloading charges to make the same apply exclusively to the line-haul carriers so as not to impose any part of said charge on the shippers, is clearly shown by the representations of Mr. Shaw, the attorney for the Union Stock Yard and Transit Company, at various hearings before the Commission. Mr. Shaw there stated with reference to said schedules, (Cert. Excerpts from Orig. Exhibits pages 54 and 55):

"That tariff notified each person for whom we act as the carriers' agent that we will charge them for that service more than we had previously charged to the extent that the tariff increased the rates; there was notice to the carriers to that effect and they did not object to it. We have a right under that tariff to collect from the same people that have been paying us since 1865 the advance charge. That is my contention."

Mr. Shaw further stated, (Cert. Excerpts from Orig. Exhibits page 56):

"I say that the plain phraseology of the tariff shows that we propose to increase the charge for the service we rendered to those for whom we have always rendered it, to-wit: the carriers whose agents we are and not to any shipper in the United States."

(See also Cert. Excpts. from Orig. Ex. pp. 57-58.)

Mr. Shaw further stated at one of the hearings before said Commission, (Orig. Exhibit No. 6, page 577)

"Mr. Burgess: (attorney for one of the line-haul carriers) I want to know for my own information, do you now contend Mr. Shaw, that the tariff which you filed does not create a lawful charge against the shipper as filed with the Commission?

"Mr. Shaw: The tariff which was filed in my judgment, if it is a tariff at all, increased the charge to the people that have always paid us for the service and not the shipper."

IT IS WHOLLY IMMATERIAL IN THIS CASE WHETHER THE STOCK YARD COMPANY WAS AUTHORIZED BY THE LINE-HAUL CARRIERS TO PUBLISH ITS TARIFFS IN SUCH FORM AS TO CLEARLY INDICATE THAT THE SAME WERE FILED BY IT AS THE AGENT OF THE LINE-HAUL CARRIERS AND SO AS TO MAKE THE RATES AND CHARGES THEREIN CONTAINED APPLY SOLELY TO THE LINE-HAUL CARRIERS.

It is contended by respondent Director General of Railroads that the Stock Yard Company had no authority from the line-haul carriers to file its published tariffs in the form in which they were published. Counsel for respondent Stock Yard Company do not join in this contention. It is insisted that agency cannot be shown by the mere declarations of the agent, and that the statements contained in the published tariffs of the Stock Yard Company that said tariffs were filed by it as the agent for the line-haul carriers amounted to nothing, because it was the mere declaration of the Stock Yard Company that it was, in the performance of the services set forth in its published tariffs, acting as the agent for the line-haul carriers. Regardless of the fact that the record before the Interstate Commerce Commission clearly shows that the Stock Yard Company for more than 50 years, and at all times since its creation, acted as agent for the line-haul carriers in performing for them a terminal service inseparably connected with their duty to transport live stock, nevertheless it is wholly immaterial in this case whether the Stock Yard Company, in so publishing its tariffs, was or was not authorized by the line-

haul carriers so to do. Even if we were to assume, which we do not, that a carrier performing a terminal service in connection with the through and complete transportation of live stock undertaken by a line-haul carrier, may not lawfully, under the provisions of the Interstate Commerce Act, file its tariffs of rates and charges in such a manner as to make the same applicable only to the line-haul carrier for whom it performs the terminal service, nevertheless, since the Stockyard Company actually did publish their tariffs in that manner, such tariffs did not constitute lawful authority to exact said charge from petitioners.

WHILE THE PUBLISHED RATES OF THE STOCK YARD COMPANY WERE ITS LEGALLY ESTABLISHED RATES, AND IN THAT SENSE LEGAL, THEY WERE NOT LAWFUL RATES AS AGAINST THE CONSIGNEES FROM WHOM THEY WERE EXACTED.

It is apparent also that the Circuit Court of Appeals, in justifying the exactment from the shipper of the additional 25 cents per car through the method or practice adopted by the line-haul carriers and the Stock Yard Company, on the ground that the Stock Yard Company, being a common carrier, was compelled by law to collect the full amount provided in their published tariffs for the performance of such service, overlooked this important fact, namely, that in the published tariffs of the Stock Yard Company it was specifically stated, "the charge made by this company for the service (as a carrier's agent) of loading and unloading live stock at the Union Stock Yards, Chicago, Illinois, is as follows" etc. The statement made in the published tariffs of the Stock Yard Company, that the charge of that company for the service of loading and unloading live

stock at the Union Stock Yards in Chicago was for a service performed by it as the carrier's agent, cannot be disregarded. Whether the Stock Yard Company could properly file its tariffs of rates and charges to confine the force, effect and operation of such charges to the line-haul carriers for whom it performed the loading and unloading service, is not controlling on the question involved. The question is—having so filed their published tariffs as to make the same applicable to the line-haul carriers, could the Stock Yard Company lawfully collect said charges from the shipper or consignee?

The Circuit Court of Appeals in its opinion proceeds on the theory that under the law the Stock Yard Company was compelled to collect its published rates and charges, and that in collecting its published rates and charges it was doing only what the law compelled it to do. The opinion, however, loses sight of the distinction between the legal rate and the lawful rate.

As this court says in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 52 Sup. Ct. Rep. 183, on page 184:

> "Although the act thus created a legal rate, it did not abrogate, but expressly affirmed, the common law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate • • •. Under Section 6 the shipper was bound to pay the legal rate; but, if he could show that it was unreasonable, he might recover reparation."

The right to reparation is the same where the exaction of the charge is unlawful on the ground that it is exacted with tariff authority, as where the charge exacted is unlawfud on the ground that it is unreasonable too high. While a carrier is, under penalty of law, compelled to collect the charges set forth in its published

tariffs, it does not follow that in order to do so, it may lawfully collect such charges from one against whom such charges were by said tariffs made inapplicable. Therefore, while the rates in the Stock Yard Company tariff were legal rates the exaction of the same from petitioner was unlawful.

In the opinion of the Circuit Court of Appeals, in justifying the collection of the extra 25 cents per car, it is said (R. 396):

> "The line-haul carriers definitely refused to absorb it," and (R. 397) "No one was taken by surprise or deceived."

We submit that the verbal refusal of the line-haul carriers to pay the extra 25 cents per car, and the fact, if it be a fact, that no one was taken by surprise or deceived, is wholly beyond the question. The law is well established that the published tariffs on file constitute the sole and exclusive source of the shipper's information. The line-haul carriers could not lawfully deviate from their published tariffs by any verbal refusal or representation. If the line-haul carriers desired to inform the shippers and the public of any change in their former usage and practice with reference to the payment of the entire expenses of loading and unloading, the only manner in which they could lawfully indicate that intention was through their published tariffs.

THE QUESTION OF WHETHER THE EXTRA 25 CENTS PER CAR, WHEN ADDED TO THE AMOUNT WHICH THE LINE-HAUL CARRIERS IN THEIR LINE-HAUL RATES PLUS $2.00 PER CAR TERMINAL CHARGE, WAS UNREASONABLE FROM THE STANDPOINT THAT IT WAS EXCESSIVE, WAS NOT INVOLVED IN THIS CASE. WHEN THE COMMISSION FOUND THAT THE PRACTICE RESORTED TO IN EXACTING THE EXTRA CHARGE WAS UNLAWFUL IT WAS UNNECESSARY TO DETERMINE WHETHER THE CHARGE COLLECTED WAS EXCESSIVE.

Much has been said by respondents with reference to the fact that the Commission made no finding that the amount of any charge collected by either respondent was unreasonable. The Commission made no finding one way or the other on this subject. That question was not there involved. If the line-haul carriers in this case, before resorting to the unlawful practice condemned by the Commission, had amended their tariffs on file to make them conform to the increased charges promulgated by the Stock Yard Company in its tariffs, and plaintiffs had complained to the Commission that the new tariff rates of the line-haul carriers were unreasonable and excessive, then there would have been involved before the Commission not only the question as to whether the increased charges for loading and unloading were unreasonable and excessive, but whether the entire transportation charges, including loading and unloading, as set forth in the line-haul carriers' new tariffs, were unreasonable and excessive. But such was not the situation here.

Any rate or charge exacted from the shipper, which is not contained in the published tariffs of the line-haul carriers, is *ipso facto* and conclusively unlawful. Having found that the additional charge in con-

troversy was unlawful because it subjected the shipper to a charge for the same service in the published tariffs of two independent carriers and therefore in effect was a double charge for the same service, and having held that the practice resorted to by respondents to exact the unlawful charge from petitioners was unlawful, it was wholly unnecessary to also ascertain whether the charge so held to be unlawful was also unreasonable from the standpoint of its being excessive.

VI.

THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS THAT THE INCREASED CHARGE OF 25 CENTS PER CAR WAS JUSTIFIED BY REASON OF THE EXTRAORDINARY CONDITIONS PERTAINING TO THE INCREASED COST OF LABOR AND OTHER EXPENSES INCIDENTAL TO THE UNLOADING OF LIVE STOCK, WAS THE DETERMINATION OF A QUESTION OF FACT WHICH IT WAS NOT THE PREROGATIVE OF THAT COURT TO DETERMINE.

The rule is well established that courts are without power to make rates or to determine what is or what is not a reasonable rate or a justification for an increase in a rate. Such matters are vested exclusively in the Interstate Commerce Commission, and the determination of the Commission on such questions is conclusive and not subject to review by the courts, unless the Commission has acted arbitrarily or without evidence to support its conclusions or has transcended its constitutional or statutory powers. (*Standard Oil Co.* v. *U. S.*, 283 U. S. 235; *Interstate Commerce Commission* v. *Delaware L. & W. Ry. Co.*, 220 U. S. 235; *U. S.* v. *Louisville & N. R. R. Co.*, 235 U. S. 314; *Procter & Gamble* v. *U. S.*, 225 U. S. 282, at pps. 296-298.)

But if the court had power to determine that the extra

25 cents per car was justified by existing conditions relative to the increased cost of labor and cost of service generally, that question could not be determined without also inquiring as to whether the flat increases made to the line-haul carriers in their line-haul rates, based on the identical conditions referred to, were not sufficient to take care of the extra 25 cents per car. The record shows that the line-haul rates of the carriers, including the rates on live stock, which in part, as we have heretofore pointed out (*supra* page 28) included the unloading charge, were, on account of the very conditions mentioned by the Circuit Court of Appeals, increased three successive times, the first increase being 5%, the second increase being 15% and the third increase being 25% of the then existing rates. (See Ex. 7, pages 861, 890, 891.) It is extremely probable that the flat increases in the line-haul rates were sufficient, or more than sufficient, to reimburse the line-haul carriers for the payment of the additional 25 cents per car for the unloading service to its agent the Stock Yard Company.

VII.

A—THE RIGHT OF PETITIONERS TO MAINTAIN THIS SUIT MAY BE SUSTAINED UNDER THE PRINCIPLES OF LAW LAID DOWN IN THE DARNELL-TAENZER CASE, 245 U. S. 531.

May we again refer briefly to the legal character of this action and to the facts and circumstances out of which it arose. The action is not *ex contractu*, but an action in tort (*Southern Pacific Co* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, at page 534), and grows out of "the wrong done by respondents in exacting the unlawful rate of charge." (*Louisville & N. R. Co.* v. *Sloss-*

Sheffield Co., 269 U. S. 217.) In the latter case this Honorable Court, on page 234, says:

> "The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carriers. Every carrier who participates in the infliction of this wrong is liable in solido *like every other joint tort feasor.*" (Italics ours.)

Respondents, in exacting the unlawful charges involved in this case, were joint tort feasors, who cannot under the law, question the right or title of the person from whom they exacted the unlawful charges or raise any question concerning the rights and equities of others in the money exacted. (*Darnell-Taenzer* case, 245 U. S. 531; *Sloss-Sheffield* case, 269 U. S. 217.)

The testimony introduced at the various hearings before the Interstate Commerce Commission established, without contradiction, that petitioners were specifically named as consignees in the bills of lading covering the shipments involved in this case. Upon the arrival of the cars at the Union Stock Yards, petitioners, as such consignees, either paid or directly assumed all transportation charges, including the unloading charge in question, by bank checks drawn on their individual bank accounts (Cert. Excpts. Or. Ex. 156). Afterwards they in their own name and right as factors sold the live stock consigned to them and after deducting all freight and other expenses, including the unlawful charge in question, either remitted the proceeds to the consignor or credited the amount on the consignor's account. According to the established custom which prevailed in the Union Stock Yards, petitioners, as consignees of the shipments involved, were personally and primarily liable to the line-haul carriers who, for all transportation charges, looked directly to them and not to the consignors

for payment. In accordance with that custom, if overcharges of freight were paid the commission men made claim therefor upon the carrier in their own names. On the other hand, in accordance with that custom, if the carrier at any time found that there was an undercharge in the payment of freight on any shipment, it made claim directly to the commission men as consignees named in the contract of carriage (R. 151; Testimony of D. C. Mosier, Chairman of the Transportation Committee of the Chicago Live Stock Exchange, and of H. R. Park, Traffic Manager of the Chicago Live Stock Exchange; Original Ex. 8, pp. 25 to 96 and 96 to 126, referred to on page 269 of the Transcript of Record herein and certified to this court as an original exhibit).

On this subject the Commission specifically found (R. 151):

> "We find that the following individuals, copartnerships, and corporations, parties of record, made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to reparation."

This finding, under the authority of this court in *Mills* v. *Lehigh Valley R. R.*, 238 U. S. 473, is a sufficient finding of the ultimate facts to entitle plaintiffs herein to recover and that said finding is *prima facie* of the right to plaintiffs to seek recovery in their individual right as consignees from whom the unlawful charges were exacted.

Where a District Court undertook to substitute its views for a finding of the Commission with respect to relationship between the parties before it, this court, in reversing the District Court, stated as follows:

"The findings of the Commission, that the broker

> acts only as agent and that from the time that the pulp is put aboard the steamer there is a continuing intent that it should be transported to Garfield, *ought to have been accepted by the District Court as conclusive, since there was ample evidence to sustain it. Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268; *Virginia Ry Co.* v. *United States,* 272 U. S. 658." (Italics ours.) *United States et al v. Erie Railroad Co. et al.,* Appellants. Decided November 25, 1929. 280 U. S. 103.

What was said by the Interstate Commerce Commission in *Doughty-McDonald Grocery Co.,* 155 I. C. C. 47, on page 49, is particularly appropriate here. There the claim for reparations was made by a consignee. His right to reparation was questioned because it appeared that he was not the real party in interest and the one who ultimately bore the charge in question. The Commission, however, says:

> "When a carrier delivers freight to a consignee and the consignee accepts delivery and pays transportation charges thereby extinguishing the carrier's lien, a contract on the part of the consignee to pay undercharges, if any exist, is implied. Consequently, the carrier may recover in a suit for such undercharges against the consignee. *Union Pac. R. Co.* v. *American Smelting & Refining Co.,* 202 Fed. 720, 121 C. C. A. 182. For the same reasons that a consignee can be compelled to pay an undercharge, he should have the reciprocal right to recover any amount that he has been compelled to pay in excess of a just and reasonable charge."

This view of the Interstate Commerce Commission is sustained by *Union Pacific R. Co.* v. *American Smelting & Refining Co.,* 202 Fed. 720. It is also sustained by this court in a case particularly in point (*New York Central & Hudson River Ry. Co.* v. *York & Whitney,* 256 U. S. 406), where it was held that a commission man named as consignee in certain shipments made to him is directly liable to the carrier for undercharges which by mistake

were not in the first instance collected by the carrier from the commission man, and this the court held was true, as a matter of law, irrespective of any contract contained in the bill of lading. Such liability under the provisions of the Act to Regulate Commerce extends for a period of three years. (Interstate Commerce Act, Sec. 16, Paragraph 3.)

From what has been said it is obvious that petitioners in presenting and seeking to enforce reparation on account of the unlawful loading and unloading charge in question, were not mere intruders having no legal interest in the subject matter in controversy, as Judge Woodward in his opinion holds them to be (R. 77). It is difficult to understand how anyone can say that persons *named as parties to the transportation contract*, and who actually paid the unlawful charges in question to respondents, and who became personally liable to the line-haul carriers for all freight charges the instant they accepted delivery of the live stock, and who were repeatedly recognized by the carriers as the proper persons with whom to settle loss and damage claims on account of shipments of live stock consigned to them, can be said to be purely volunteers having no legal interest in a suit brought to recover the part of said freight charges so paid by them which was unlawful and exacted from them by an unlawful practice. The only parties to a tortious transaction are parties whose act or acts were instrumental in exacting the unlawful charge and the party from whom it was exacted. It makes no difference whose money it was which was exacted.

The principle which lies at the foundation of the right to reparation in a case of this kind is exactly the same as in a case where a wrong-doer wrongfully takes a sum of money in the possession of a servant, who has no ac-

tual or legal interest in the money, and where the loss ultimately must fall on the master. Obviously, in such case it would be no answer to a suit brought by the servant against the wrong-doer for him to show that the servant was not the one who was ultimately injured by the loss of the money taken. This principle is enunciated and applied by this court in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531. There this court, speaking through Mr. Justice Holmes, on page 534 says:

> "*The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum.* • • • The cases like *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations. *But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss.*" (Italics ours.)

What was said by this court in *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217, is particularly enlightening on this question. It shows conclusively that the element of pecuniary loss to the plaintiff is not controlling in a case involving the recovery of unlawful or excessive freight charges unlawfully exacted. There this court, on pages 234 and 235, says:

> "It is claimed that the Sloss-Sheffield Company cannot recover because it was not damaged by the excessive freight charges. • • • The objection urged is not that the company failed to make specific proof of pecuniary loss—the failure held in *Pennsylvania R. R. Co.* v. *International Coal Mining Company*, 230 U. S. 184, 206, to be fatal in a suit under Section 2 for unjust discrimination, and in *Davis* v. *Portland*

Seed Co., 264 U. S. 403, to be fatal in a suit under Section 4 for violation of the long- and short-haul clause. *The carrier concedes, as it must under Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, *that a recovery for excessive freight charges can be had under Section 1 without specific proof of pecuniary loss, and that the measure of damages is the amount of the excess exacted.*" (Italics ours.)

On page 240 the court says:

"*The wrong for which the statute renders the carrier liable is the exacting of payment pursuant to an unlawful rate,* not the withholding of the excess unlawfully exacted."

In the *Sloss-Sheffield* case, on page 238, the court says:

"With the rights or equities as between seller and purchaser it (referring to the carrier) had and has no concern, nor need we concern ourselves with them."

Here petitioners, by accepting the live stock consigned to them by the shippers in the shipments covered by this case, thereupon, under the decision of the Federal Court in *Union Pacific R. Co.* v. *American Smelting & Refining Co.*, 202 Fed. 720, and under the decision of the Supreme Court of the United States in *New York Central & Hudson River Ry. Co.* v. *York & Whitney*, 256 U. S. 406, became *ipso facto* personally liable for the payment of the freight charges regardless of the terms and provisions of any contract contained in the bill of lading. Petitioners being thus personally liable, paid the freight rate, including the unlawful charges, out of their own funds. The fact that petitioners in the due course of business, after the shipment of live stock was sold as an independent transaction, charged the freight, including the unlawful charge, to the owner or consignor of the live stock, does not mean that the unlawful charges were paid by petitioners out of the shippers' funds. The identity

of the money received from the sale of cattle by petitioners was not preserved. The unlawful charges in question were paid by checks drawn by petitioners against their own funds. (Certified Excerpts from Original Exhibits, p. 156.) The money exacted therefore was the money of petitioners.

The fact that the commission men, in remitting to their principals the proceeds of the sale of live stock, deducted the extra amount over and above the lawful charges which should have been paid, merely gave the principals a separate right of action against the commission men for the amount of the deduction. Respondents, who became joint tort feasors the moment the unlawful charges were exacted from the commission men, could acquire no legal right in a subsequent transaction in which they were not parties and had no legal interest. As one joint tort feasor cannot claim contribution from another joint tort feasor, so, in principle, respondents can assert no rights arising out of a subsequent separate transaction which gave rise to an independent cause of action against the commission men and in favor of their principals to recover the amount deducted by the commision men over and above the lawful charges which should have been deducted.

Granting that the owners or consignors of the live stock, under the particular facts and circumstances in this case, could have directly and individually maintained the proceedings for reparation before the Interstate Commerce Commission and have prosecuted suit for damages based on said order of reparation in the District Court, it does not follow that petitioners from whom the unlawful charges in question were exacted did not also have such legal right, especially where, as in this case, petitioners acted under express authorization from

the owners or consignors. The rule is well established that an action for damages growing out of the shipment of property may be maintained either by the consignor or consignee, or by the owner of the property transported.

In *Edgerton* v. *C. R. I. & P. R. Co.*, 240 Ill. 311, the question arose as to whether the carrier, when sued by the consignor of a shipment of eggs, could call into question the title of the consignee to the same and whether the consignee, though shown to be not the owner of the property, could maintain an action for damages to recover the value of such shipment. The court in that case sustained the right of the consignee to bring the action, and in doing so quoted from *Great Western Railway Co.* v. *McComas*, 33 Ill. 186, as follows:

> "No principle is better settled than that the consignor for breach of the duty, be he but a bailee, may sue. He has such a special interest in the property as gives him the right of action, *so may the real owner sue and so may the consignee.*" (Italics ours.)

On page 317 of the opinion the court further says:

> "Even assuming that they were shipped to bailee to be sold on commission (bailee being the consignee) he had such an interest, under *Great Western Railway Co., supra,* and the authorities heretofore cited, that he could rightly recover in an action of tort against the appellant."

In *Finn* v. *Western Railroad Co.*, 112 Mass. 524, it was held that the consignor of goods delivered to a carrier for shipment may maintain an action and recover the full value of the property although it be admitted that such consignor is not the owner of the property and has no property interest therein, and where it is admitted that the entire ownership and interest in the property is in the consignee, the court holding that in such case a

recovery by the consignor constitutes the consignor trustee of an express trust for the use and benefit of the actual owner.

The same rule is announced in *Hooper* v. *The Chicago & Northwestern Ry. Co.*, 27 Wis. 81, where the court, on pages 90 and 91 of the opinion, says:

> "The fourth and last position taken is, that the plaintiff was not the owner of the flour at the time of the loss, and cannot sue, but that the title was in the consignees, who alone can maintain an action. In *Blanchard* v. *Page*, 8 Gray, 281, it was held, after a most elaborate examination, that the shipper named in a bill of lading may sue the carrier for an injury to the goods, although he has no property, general or special, therein. * * * The shipper is a party in interest to the contract; and it does not lie with the carrier who made the contract with him, to say, upon a breach of it, that he is not entitled to recover the damages, unless it be shown that the consignee objects; for, without that, *it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor or shipper is, by operation of the rule, regarded as a trustee of an express trust, like a factor or other mercantile agent who contracts in his name on behalf of his principal.*"

In *Southern Express Co.* v. *Kraft*, 49 Miss. 480, the rule as laid down by the Supreme Court of Wisconsin in *Hooper* v. *The Chicago & Northwestern Ry. Co.*, 27 Wis. 81, is adopted and quoted with approval.

The rule is thus laid down in 10 Corpus Juris, 349:

> "If the consignor has no interest in the goods and his right of action is based solely on privity of contract, an action by him for failure to carry and to deliver safely to the consignee will inure to the benefit of the consignee or real owner; *in such case the consignor is considered trustee of an express trust.*"

NOTE: It is important to keep in mind that this court in the *Sloss-Sheffield* case did not state or intimate that if the suit for reparation in that case had been brought by the consignee who in the first instance paid the unlawful charges, such consignee could not have maintained an action to recover the same. If the consignee in the *Sloss-Sheffield* case had brought the suit for reparation and the consignor had acquiesced in the claim being made by the consignee, then undoubtedly the Supreme Court in the *Sloss-Sheffield* case would have held, under the rule applied in the *Darnell-Taenzer Lumber Company* case, 245 U. S. 531, that the consignee would have the right to maintain said suit, and if the carrier had objected to the consignee maintaining such suit, it would have been met with the rule as laid down in the *Darnell-Taenzer* case, and would have been met by the identical language used by this court in the *Sloss-Sheffield* case, on page 238:

> "The carrier did not know of the provision in the sales contracts. With the rights or equities as between seller and purchaser it had and has no concern, nor need we concern ourselves with them."

It is significant that in the *Sloss-Sheffield* case this court, on page 237 of the opinion, refers to the fact that the consignees named in the shipments in that case had acquiesced in the prosecution of the claim for reparations by the consignor. There is nothing to indicate that the court in the *Sloss-Sheffield* case intended to recede in the slightest degree from the rule laid down in the *Darnell-Taenzer* case, to the effect that the carrier ought not to be allowed to retain his illegal profit and that the one who was in relation with him and from whom the carrier took the sum can recover.

Since the decision of Judge Woodward, the Interstate Commerce Commission, after having had called to their

attention the decision of Judge Woodward in this case, have continued to apply the rule as laid down in *Missouri Portland Cement Co.* v. *Director General,* 88 I. C. C. 492, and the long line of decisions based on that case and on the reasoning of the Supreme Court of the United States in the *Darnell-Taenzer* case. The latest case in the Court on the subject is *Consolidated Cut Stone Co.* v. *Atchison, T. & S. F. Ry. Co.,* 39 Fed. (2d) 661. In that case the carriers made exactly the same contention as the defendants are making here. The court, however, adopted the interpretation of the *Darnell-Taenzer* case, 245 U. S. 531, and the *Sloss-Sheffield case,* 269 U. S. 217, as we interpret those decisions.

The court then cites as its authority the language of this court in the *Darnell-Taenzer* case, 245 U. S. 531, at page 551:

> "The general tendency of the law in regard to damages at least is not to go beyond the first step. * * * The plaintiffs suffered losses to the amount of the verdict, which they paid. Their claim accrued at once on the theory of the law, and it does not inquire into later events."

B—PLAINTIFFS IN THIS CASE ARE SHOWN BY THE RECORD HEREIN TO HAVE OCCUPIED A SOMEWHAT BROADER RELATIONSHIP TO THEIR CUSTOMER SHIPPERS THAN THAT OF AN ORDINARY FACTOR, WHICH RELATIONSHIP UNDER THE PARTICULAR FACTS IN THIS CASE, DID NOT CEASE WHEN THEY REMITTED TO THEIR CUSTOMERS A PART ONLY OF THE PROCEEDS DERIVED FROM SAID SHIPMENTS, BUT CONTINUED THEREAFTER AND STILL CONTINUES; THAT BY VIRTUE OF THIS RELATIONSHIP, AND FROM DIRECT CONNECTION WITH THE TRANSPORTATION TRANSACTIONS IN QUESTION, PLAINTIFFS HAD THE LEGAL RIGHT IN THEIR OWN NAMES AND RIGHT TO MAINTAIN SAID PROCEEDINGS FOR REPARATION BEFORE THE INTERSTATE COMMERCE COMMISSION AND TO MAINTAIN THIS SUIT IN THE DISTRICT COURT.

Our position under this phase of the case is that the law has always recognized the right of the ordinary factor to bring suit in his own name and in his own right, either disclosing the name of his principal or not, as he may see fit, to recover the property consigned to him, or the proceeds, or any part thereof, and to recover for any injury to said property after the same may have come into possession, and that that right exists so long as the relationship of the parties continues and so long as there remains any duty for the factor to perform. This rule of the common law is laid down in 25 Corpus Juris, 406, as follows:

> "As against a wrongdoer, a factor may maintain an action in his own name for torts relating to the goods in his possession, and may recover damages to the full amount of the injuries to the goods."

Judge Woodward in his opinion admits the rule of the common law to be as we have stated. In his opinion (R. 76) he says:

> "That a factor has authority to bring suit in his own name for damage or injury to goods in his business as a factor, or to recover the purchase price

where he has an interest in the way of commissions or advancements, and in other circumstances where he is a trustee of an express trust, there can be no doubt."

Judge Woodward, in coming to the conclusion that plaintiffs as factors had no right to sue in their own names, does so on the theory that the relationship between the shippers and the plaintiffs, and all duties of the plaintiffs growing out of said relationship, absolutely ceased when the plaintiffs remitted the net proceeds derived from the sale of live stock to their respective customers. A moment's reflection, however, will demonstrate that the relation, duties and obligations of the commission men, plaintiffs in this case, were not at an end when they remitted *only a part of the money to which the shippers were lawfully entitled.* The shippers were entitled to the full amount of the proceeds of the sale of their cattle, less only lawful charges and deductions.

Here the commission men remitted only a part of the proceeds to which the shipper was lawfully entitled. As to the part which they did not remit,—the part covered by the unlawful unloading charge exacted,—the commission men were still legally liable to the shipper and under a duty to collect and remit the amount of the same to the same extent as they were at the beginning to remit the entire proceeds of the sale, less lawful deductions. Especially is this true under the uncontradicted facts in this case.

Here the record shows that when said commission merchants and members of said Chicago Live Stock Exchange in the first instance paid said unlawful unloading charges to the carriers, and afterwards charged the same back against the individual shippers, or deducted

from the proceeds due said individuals from said shippers the amount of the same, they represented and gave assurance to said shippers that they would present to said Interstate Commerce Commission a claim for reparation for the use and benefit of said shippers (R. 340; Testimony of D. C. Mosier taken before the Interstate Commerce Commission and shown on pages 25 to 96 of Defendants' Original Exhibit 8, referred to on page 269 of the Record; Testimony of H. R. Park, taken before said Interstate Commerce Commission and shown on pages 96 to 126 of Defendants' Original Exhibit 8; Testimony of approximately fifty commission merchants, plaintiffs in this case, who testified before the Interstate Commerce Commission at its session of October 3, 1922, as shown by Defendants' Original Exhibit 9, referred to on page 270 of the Record.)

It is admitted that a factor is ipso facto the trustee of an express trust. Is it possible to conceive, from a legal standpoint, of the relation of trustee and *cestui que trust* being ended while the trustee still has duties to perform?

In *Hamilton* v. *Dillin*, Federal Case No. 5979, reported in Federal Cases, Volumes 11 and 12, at page 332, this contention of Judge Woodward was squarely refuted. There the court, on page 333, says:

> "For the plaintiffs it was contended that they were entitled to maintain the action as factors *even if their factorship had terminated before the commencement of this suit.*" (Italics ours.)

On page 334 of the opinion the court, in disposing of this question, says:

> *"If as factors in charge of the cotton the plaintiffs were required to pay and did pay for permits to ship the same to the loyal states, and the exaction of the money so paid was illegal, I think that they*

became entitled to recover the aggregate of the money thus paid, unless there is some reason to the contrary which would preclude a recovery by the owners themselves." (Italics ours.)

In *Smith & Son* v. *Bloom,* 159 Iowa, 592, suit was brought by a commission firm at the Union Stock Yards at South Omaha, Nebraska, to recover the purchase price of certain sheep consigned to them by a shipper. Suit was brought by the plaintiffs as commission men in their own names, *and after they had remitted all of the proceeds of sale to the owner and shipper. It was contended by the defendant that plaintiffs could not maintain the suit in their own names because they were not the real parties in interest and because the relation of principal and factor had ceased when the plaintiffs remitted the proceeds of the sale to the owner and shipper.* The court, however, on page 597 of the opinion, says:

"Counsel for appellee contends that plaintiff cannot maintain this action for the reason that it was acting for another, *and is not the real party in interest.* * * * It may be that as between plaintiff and its principal there would be a duty on plaintiff's part to account to the principal for any recovery herein, if that has not already been done. *Plaintiff is a factor, and as such, unless there is some objection on the part of its principal, or unless the principal intervenes, may sue in its own name and recover damages for a breach of the contract, or to recover the purchase price.*" (Italics ours.)

On page 598 the court says:

"*But it is said for appellee that plaintiff has paid to his principal the full amount of the purchase price.* * * *. That was a matter between plaintiff and its principal, and no affair of the defendant.*" (Italics ours.)

In *Progress Blue Ribbon Farms* v. *Chicago Horse Sales Co.,* 153 Wis. 249, the court says:

"*As indicated, a factor, the same as an auction-*

eer, is entitled to sue for the sale price in his own name and control the litigation if the principal does not prohibit it.'' (Italics ours.)

In *Beardsley* v. *Schmidt,* 120 Wis. 405, Judge Marshall, on page 411, says:

"Possession of the property, with authority to sell it in the capacity of commission merchants, made them factors, with the implied authority incident thereto, and also made them trustees of an express trust with the right to bring this suit, * * *. As soon as appellants assumed in regard to the property the status of commission merchants, they acquired a special interest therein which was increased by the continuance of their possession and their services in making the sale, giving them the right, within all the authorities, to bring this action and to control the litigation, *since there is nothing to indicate that such control is contrary to the wishes of the owners of the property.''* (Italics ours.)

The finding of the Commission as to the relationship existing between petitioners and the owners or consignors of the live stock involved in the shipments in question, clearly sustains the right of petitioners in this case to maintain this suit. The Commission says (R. 151):

"There is a direct and well established relation between the complaining members of the Exchange and other shippers, by which the former are fully authorized to present these claims and seek awards of reparation in their own names as factors and agents for such shippers. The commission merchant at the stock yards not only disposes of the shipper's stock at the market and at such price as he deems best, but is his agent in the payment of freight and related charges, such as feeding, etc., and in the filing of claims for overcharge and for the loss and damage to stock in transit. Defendants have frequently recognized this relationship by settling loss and damage claims with the commission merchants."

The Circuit Court of Appeals, under the rule repeatedly laid down by this court, should have accepted the finding of the Commission with reference to the relationship between the consignors or owners of the live stock in question and petitioners. (*Western Chemical Co.* v. *United States,* 271 U. S. 268; *Virginian Ry.* v. *United States,* 272 U. S. 658; *United States* v. *Erie R. R. Co.,* 280 U. S. 103; *Mills* v. *Lehigh Valley R. R. Co.,* 238 U. S. 473.) But even if the technical relation of principal and agent ended when the commission men remitted only a part of the proceeds to which the shippers were lawfully entitled, then clearly the acts of the commission men, plaintiffs in this case, by reason of the representations that they would obtain reparations for the shippers for the unlawful charges deducted, coupled with the course pursued by said plaintiffs before the Interstate Commerce Commission in obtaining reparation, *clearly constituted said plaintiffs trustees of an express trust and as such they were entitled to maintain the original petition in the District Court.* If they were trustees of an express trust, it was not necessary, under the law, that in said petition they disclose the names of the beneficiaries in whose behalf they were acting, although that fact clearly appears when the original petition and the exhibits accompanying it and made a part hereof are read as a whole.

If it was so necessary the District Court, to prevent a failure of justice on a mere technicality, should have permitted the amendment to the petition prayed for by petitioners. (R. 318 to 333.)

The right of commission men and factors in reparation cases has been frequently recognized by the Commission.

Memphis Freight Bureau v. *St. Louis & San Francisco Ry. Co. and Director General,* 57 I. C. C. 212; *Detroit*

Coal Exchange v. *Director General as Agent*, 80 I. C. C. 258; *Texas Live Stock Shippers' Protective League* v. *Director General*, 139 I. C. C. 448.

The cases above referred to are only a few of scores of orders of the Commission of like character. This court and the Federal courts have repeatedly enforced orders for reparations entered by the Interstate Commerce Commission in cases where the proceedings before the Commission were at the instance and on the complaint of persons, organizations and societies acting in their representative capacity for the use and benefit of the real party or parties in interest.

The decision of this court in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, is in principle, and because of the reasoning therein contained, conclusive on the question of the right of one person having no pecuniary interest in the reparation sought to maintain a suit in his own name for the use and benefit of other persons who were the real parties in interest and who actually sustained a pecuniary loss and injury.

That case was instituted before the Interstate Commerce Commission by the Cattle Raisers' Association of Texas, a voluntary unincorporated society, and the Commission, on complaint of that Association, ordered reparation. Claims for reparation were made by one Spiller, Secretary of the Cattle Raisers' Association, under certain alleged assignments purporting to have been made by the shippers of cattle involved in the transactions out of which the claims for reparation arose. Spiller recovered a judgment in the District Court of the United States for the Western Division of Missouri for the amount of the award of reparation as made by the Commission. The Circuit Court of Appeals, Eighth Circuit, in the case of *Atchison, T. & S. F*

Ry. Co. v. *Spiller,* 246 Fed. 1, reversed the judgment of the District Court in favor of Spiller on the ground that the record disclosed in Spiller no such interest as would enable him to maintain said suit. The case then came to this Court on certiorari and is reported in the case of *Spiller* v. *A. T. & S. F. Ry. Co.,* 253 U. S. 117.

It appears in the opinion in that case, page 123, that in that case the shipments of live stock were usually consigned to a commission firm; that the freight was paid in the first instance by the consignee to the delivering carrier and subsequently the cattle were sold upon the market and the amount of freight deducted from the purchase price, remittance being made of the balance, so that in all cases the owner and shipper of the cattle finally paid the transportation charges. This court sustaining the order of the Commission reversed the Circuit Court of Appeals for the Eighth Circuit, and, in referring to the right of Spiller to maintain the action, on page 124 says:

> "In some of the claims the shippers made assignments to H. E. Crowley, then being Secretary of the Cattle Raisers' Association, in a form set forth in the report; that subsequently Crowley ceased to be such Secretary and was succeeded by Spiller, the plaintiff, to whom Crowley assigned all claims previously assigned to him; and that other specified claims were assigned by the shippers to Spiller after he became Secretary, the form of assignment being the same as that previously employed."

Coming to the grounds on which the Circuit Court of Appeals for the Eighth Circuit reversed the judgment of the District Court, this court, on pages 133 and 134 of the Spiller case, says:

> "That court" (referring to the Circuit Court of Appeals for the Eighth Circuit) "held that upon the undisputed evidence the legal title to the claims for reparation never vested in Spiller, and hence

that the Commission was wholly without authority to order reparation to be made to him."

The court then held that this fact would not prevent Spiller from prosecuting the suit, for, as the court says:

"There was evidence that the assignments were made for nominal considerations *because the Cattle Raisers' Association was prosecuting the claims for the benefit of the owners thereof.*" (Italics ours.)

The court, in referring to said assignments by the shippers to Spiller, says, on page 134:

"What they did not pass to him was the beneficial or equitable title. But this was not necessary to support the right of the assignee to claim an award of reparation and enable him to recover it by action at law brought in his own name but for the benefit of the equitable owners of the claims; especially since it appeared that such was the real purpose of the assignments. • • • Section 16 as amended provides that where an award of damages is made by the Commission and the carrier does not comply with the order the complainant, *or any person for whose benefit such order was made,* may bring suit." (Italics ours.)

When the opinion of the Supreme Court in the *Spiller* case is examined, it clearly appears that this Court in that case construed said alleged assignments to Spiller, *not as assignments in the ordinary sense of that term, but merely writings executed by the shippers to enable the Cattle Raisers' Association to prosecute the claims of the shippers for reparation,* and held that although Spiller was not the real party in interest, he was justified in bringing said suit in his representative capacity for the use and benefit of the shippers who were the real parties in interest. In other words, this Court construed said alleged assignments to be nothing more or less than powers of attorney. In the case at bar the record before the Interstate Commerce Commission shows (Certified Excerpts from Or. Ex. pp.

140-153) (Original Ex. 8, p. 102) by the testimony of H. R. Park, the Traffic Manager of the Chicago Live Stock Exchange, that the commission men, members of the Chicago Live Stock Exchange and plaintiffs in this case, *held powers of attorney from all of the shippers upon all of the shipments upon which plaintiffs filed claims.* Therefore, under the decision of this Court the United States in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, as well as under the spirit and intent of the provisions of the Act to Regulate Commerce, plaintiffs had the right not only to represent said shippers before the Commission, but to bring suit in the District Court to recover damages in accordance with the Commission's award.

Conclusion.

The record in this case shows exceptionally long and laborious proceedings before the Interstate Commerce Commission, including the taking of extraordinarily voluminous proofs, which it required many years to collect, marshal and present to the Commission. The tremendous task of furnishing to the Commission proof of possibly a million or more separate shipments from 174,600 shippers, and covering the unlawful charges exacted in this case, has meant years of research and labor and obviously the necessary expenditure of many thousands of dollars. The result of all these years of labor and effort, with the attendant expenditure of money, is in a moment swept away by the Judge of the District Court on the basis of a highly technical rule of procedure and practice, and by the decision of the Circuit Court of Appeals predicated largely on the ground that that court disagreed with the Interstate Commerce Commission

in its determination of the facts in the case and the meaning of the published tariffs of the line-haul carriers.

The Commission was fully informed as to all facts the determination of which were inextricably bound up with the ultimate question involved. The questions necessarily incidentally involved related to a great extent to matters of policy and the proper handling of live-stock in the principal live-stock market in the world, where the needs and necessities of the situation and the particular usages and customs there prevailing made the case dependent largely on the particular facts and circumstances at that market.

The Circuit Court of Appeals and the District Court should have accepted the findings and conclusions of the Commission.

We respectfully submit that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit and the judgment of the District Court be reversed and the cause remanded to the District Court with such directions as this court may deem appropriate.

Respectfully submitted,

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Attorneys for Petitioners.

February 22, 1932.

FILE COPY

APR 15 1
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,
Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,
Respondents.

PETITIONERS' REPLY TO BRIEF OF RESPONDENT DIRECTOR GENERAL OF RAILROADS ON THE MERITS.

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INDEX.

	Page
Statement	1
Summary of Argument	3
Argument:	
Point I — It is respondent's not petitioners' contentions which are largely based on fundamental misconceptions of the true facts in the case	12
Point II—Under this subdivision counsel for the respondent Director General of Railroads seek to persuade this court to inquire as to the sufficiency of the evidence to sustain the finding of the Commission that it was the duty of the line-haul carriers under the particular facts and circumstances in the instant case to load and unload live stock at the Union Stock Yards in Chicago	29
Point III—The specific finding of the Commission that the stock yards were the terminals of the line-haul carriers was amply sustained by the evidence before the Commission—in fact, there was no evidence to the contrary.	33
Point IV—We admit the Yard Company was a common carrier subject to the jurisdiction of the Interstate Commerce Commission and that it was bound to observe all of the terms, provisions and restrictions contained in its published tariffs	36
Point V—The increased charge of 25 cents per car was exacted from your petitioners in this case as the result of an unlawful practice in which both the line-haul carriers and the Yard Company were joint participants; it was wholly immaterial which of them in the first instance physically collected the charge, or, in the last analysis, which of them retained it	43

Point VI—While in general the making and collecting of a separate charge for a terminal service in addition to the line-haul rates is proper and lawful, the making and collecting of a separate charge from the shipper on the authority of the published tariffs of the Yard Company for a service which was already covered by the established line-haul rates to Union Stock Yards., Ill., plus $2 per car terminal charge, was both unreasonable and unlawful. The finding of the Commission that the practice resorted to by the line-haul carriers and the Yard Company was an unreasonable and unlawful practice, being inseparably connected with the determination of facts by the Commission, should be accepted by this court 46

Point VII—The Yard Company in performing the loading and unloading service at all times since its creation acted as the agent or instrumentality of the line-haul carriers performing a service inseparably connected with the undertaking of the line-haul carriers in their published tariffs and in its published tariffs specifically stated that the rates and charges contained in its published tariffs were for services which it performed as a carrier's agent 51

Point VIII—The argument of respondent that Congress did not consent that the agent appointed by the President might be proceeded against before the Interstate Commerce Commission for a tort, but only for damage resulting from the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations and practices, states an anomalous position..... 59

Point IX—The absorption tariffs of the line-haul carriers did not furnish the measure of their obligation with reference to the loading and unloading service..... 63

Point X—The contention of respondent Director General that petitioners had no right to maintain this action has been anticipated and answered in petitioners' brief on the merits, pages 75 to 96..... 68

CASES CITED.

American Express Co. v. Caldwell, 244 U. S. 617..... 69
Arcadia Mills v. Carolina Co. & O. Ry., 293 Fed. 639..... 76
Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U. S. 370 39
Board of Trade v. C. & A. R. R. Co., 3 I. C. C. 235..... 17
Cattle Raisers' Assn. v. Fort Worth & Denver City R. R. Co., 7 I. C. C. 513..... 17
Chicago Live Stock Exchange v. C. G. W. Ry. Co., 10 I. C. C. 428 17
Cleveland & St. Louis Ry. v. Dettlebach, 239 U. S. 588..... 14
Consolidated Cut Stone Co. v. Atchison, T. & S. F. Ry. Co., 39 Fed. (2d) 661..... 77
Covington Stock Yards Co. v. Keith, 139 U. S. 128.....31-41-76
Davis v. Henderson, 266 U. S. 92.....39-54
Erie Railroad Co. v. Shuart, 250 U. S. 465..... 14
Great Northern Ry. v. Merchants Elevator Co., 259 U. S. 285.. 76
Illinois Central R. R. v. Interstate Commerce Commission, 206 U. S. 441.....75-76
Interstate Commerce Commission v. C. B. & Q. R. R. Co., 186 U. S. 320..... 48
Interstate Commerce Commission v. Delaware, L. & W. Ry. Co. 220 U. S. 235.....6-34
Interstate Commerce Commission v. Stickney, 215 U. S. 98...48-49
Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541..... 76
Louisville & N. Ry. Co. v. Central Iron Works, 265 U. S. 59.. 39
Louisville & N. Ry. Co. v. Maxwell, 237 U. S. 94..... 39
Meeker v. Lehigh Valley Ry. Co., 236 U. S. 412..... 69
Merchants & Manufacturers Traffic Assn. v. United States, 231 Fed. 292 76-77
Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554.....10-60
Panhandle & S. F. Ry. Co. v. Crawford, 198 S. W. 1079..... 42
Panhandle & S. F. Ry. Co. v. Phillips, 197 S. W. 1031..... 41
Procter & Gamble v. United States, 225 U. S. 282.....6-34
Standard Oil Co. v. United States, 283 U. S. 235.....6-34-75
United States v. Louisville & N. R. R. Co., 235 U. S. 314.....6-34
United States v. Union Stock Yard, 226 U. S. 286.....31-36-42-76
24 I. C. C. 96, 112..... 36
62 I. C. C. 261, 267..... 36

Statutes Cited.

Act to Regulate Commerce:
Sec. 1 (3) (4) 13, 14
Sec. 6 (1) U. S. C. A., Tit. 49, Sec. 6, par. 1, pp. 240-241 48
Sec. 6 (4) U. S. C. A., Tit. 49, Sec. 6, par. 4, p. 281 ..... 56, 57

Transportation Act:
Sec. 15 (5) 30, 31
Sec. 206-A, U. S. C. A., Tit. 49, Sec. 74, p. 357 ..... 59, 60, 61

Federal Control Act:
Sec. 10, Chap. 25, 40 Stat. 451, 456, 457 60

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STATEMENT.

Counsel for respondent Director General of Railroads start their brief with the statement, "petitioners' statement of facts omits many essential facts and is, in some respects, misleading and erroneous," and then, making no attempt to point out such alleged omissions, misleading or erroneous facts, proceed with a highly partisan and colored

statement of interwoven alleged facts, argument and contentions.

Respondent's statement of facts merely reiterates the salient facts set forth in petitioners' brief, coloring the same by reference to portions of the reversed and discarded report of the Commission of February 11, 1919, and by voluminous quotations from carefully selected portions of the testimony of a few of more than one hundred witnesses who testified before the Commission. The statement is studiously arranged to furnish the basis of the argument which follows.

In the preparation of respondent's argument counsel ignore the usual practice of following the subdivisions of petitioners' brief and replying to the points therein contained. Instead of so doing, they set up their independent subdivisions and points and devote their argument to such points, not attempting to follow or answer the points and arguments in petitioners' brief. This departure from the usual practice obviously tends to detract from the force and effect of the vital and controlling points made in petitioners' brief on the merits and to divert attention from such points.

SUMMARY OF ARGUMENT.

I.

PETITIONERS HAVE NO MISCONCEPTION OF THE FACTS.

A. THE PUBLISHED TARIFFS OF THE LINE-HAUL CARRIERS COVERED TRANSPORTATION TO THE STOCK YARDS, INCLUDING THE UNLOADING THEREOF.

It is urged by respondent Director General of Railroads that we are in error in stating that the line-haul rate, plus the $2.00 terminal charge, included the unloading of live stock at the Stock Yards in Chicago. The basis of our contention is the precise, definite and conclusive finding of the Commission on this subject, fortified by the uncontradicted testimony (a part of which we have referred to at pages 44 to 47 of our brief on the merits). The finding of the Commission is (R. 144) "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for years constituted the through charge and included the delivery of live stock to the consignee at the Stock Yards." Respondent Director General of Railroads challenges the correctness of this finding. We accept the challenge and leave it to this Honorable Court to determine whether the finding of fact of the Commission on this vital and controlling proposition in the case is to be accepted, as we contend it should be, or ignored, as counsel for the Director General contend it should be.

B. THE YARD COMPANY, NOTWITHSTANDING THE FACT THAT IT WAS A COMMON CARRIER, WAS IN FACT THE AGENT OF THE LINE-HAUL CARRIERS IN PERFORMING A PART OF THE THROUGH TRANSPORTATION SERVICE WHICH THE LINE-HAUL CARRIERS IN THEIR PUBLISHED TARIFFS HELD THEMSELVES OUT TO PERFORM.

That the Yard Company was a common carrier and required to file and maintain its tariffs is not disputed. Nevertheless, under the disputed evidence in this case, in the performing of the loading and unloading service at the Union Stock Yards it was, in fact and in law, acting as the agent or instrumentality of the line-haul carriers, and in its published tariffs its charges were expressly limited to its charges as agent for the line-haul carriers. The statement of respondent Director General that the alleged agency was repudiated and did not exist is not supported by the record. The statement of respondent that the Commission found that the alleged agency was repudiated and did not exist (citing R. 137) is also without foundation, inasmuch as the Commission made no such finding (R. 137).

C. A MATTER OF ADMINISTRATIVE DISCRETION WAS INVOLVED IN THE DECISION OF THE INTERSTATE COMMERCE COMMISSION WITH REFERENCE TO THE QUESTION AS TO WHETHER OR NOT IT WAS THE DUTY OF THE LINE-HAUL CARRIERS TO LOAD AND UNLOAD LIVE STOCK AT THE UNION STOCK YARDS IN CHICAGO, OR TO PAY ITS AGENCY OR INSTRUMENTALITY FOR THE PERFORMANCE OF THAT SERVICE.

This point is fully discussed under Subdivision III of petitioners' brief on the merits, pages 30 to 38. The question of whether or not it was the duty of the line-haul carriers to unload live stock at the Union Stock Yards was a question of fact to be determined according to actual conditions and operations at that point. No rate for the transportation of live stock could be intelligently considered or approved or disproved by the Commission unless it was

first determined by the Commission whether the obligation to unload live stock at the Union Stock Yards was on the shipper or on the line-haul carrier. The question as to whose duty it was to unload live stock at the Union Stock Yards was inextricably and inseparably bound up with the determination of the merits of the case. The question involved was not merely the construction of the published tariffs of the Stock Yard Company and the line-haul carriers, but involved the determination of many questions of fact. The Circuit Court of Appeals should have accepted the determination of the Commission on this subject.

II.

THE EVIDENCE WAS SUFFICIENT TO SHOW THE DUTY OF LOADING AND UNLOADING LIVE STOCK AT THE STOCK YARDS WAS THAT OF THE LINE-HAUL CARRIERS; THEREFORE, THE LINE-HAUL CARRIERS IN THEIR PUBLISHED TARIFFS WERE COMPELLED TO MAKE FULL AND COMPLETE PROVISION FOR THAT PORTION OF THE TRANSPORTATION SERVICE.

This question is fully discussed at pages 41 to 44 of petitioners' brief on the merits.

The contention that the Yard Company, in performing the unloading service, occupied the position of an independent common carrier, is anticipated and refuted at pages 63 and 64 under subdivision V, pages 59 to 64, of petitioners' brief on the merits.

The attempt of counsel to confuse the issue by quoting from the finding by the Commission in its first report (R. 138), which was afterwards on rehearing reversed and discarded (R. 144), should not be permitted to mislead the court as to what the ultimate findings of the Commission on this question actually were. Under this subdivision counsel

for respondent Director General of Railroads attempt to persuade the court to weigh and consider the testimony taken before the Commission with reference to the duty of loading and unloading live stock at the Union Stock Yards. This the court may not do. The only instances in which the courts will review findings of fact by the Commission are where the Commission has acted arbitrarily or without evidence to support its conclusion, or has transcended its constitutional or statutory powers. (*Standard Oil Co.* v. *United States*, 283 U. S. 235; *Interstate Commerce Commission* v. *Delaware, L. & W. Ry. Co.*, 220 U. S. 235; *United States* v. *Louisville & N. R. R. Co.*, 235 U. S. 314; *Procter & Gamble* v. *United States*, 225 U. S. 282, at pages 296 to 298.

III.

THE FINDING OF THE COMMISSION THAT THE STOCK YARDS WERE THE TERMINALS OF THE LINE-HAUL CARRIERS WAS SUPPORTED BY AMPLE EVIDENCE. SUCH FINDING RESTED ENTIRELY ON THE DETERMINATION OF THE FACTS AND SHOULD BE ACCEPTED BY THIS COURT.

It is not contended that there was no evidence before the Commission to support this express finding of the Commission, or that the Commission transcended its constitutional or statutory powers. For the same reasons and under the same authorities referred to under the preceding section of this Summary of Argument that finding is not subject to review by this court.

IV.

WHILE THE STOCK YARD COMPANY WAS A COMMON CARRIER SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION AND BOUND TO OBSERVE THE PROVISIONS OF ITS PUBLISHED TARIFFS, IT HAD NO RIGHT TO EXACT FROM THE SHIPPER CHARGES FOR UNLOADING LIVE STOCK WHEN ITS PUBLISHED TARIFFS CONTEMPLATED THE COLLECTION OF SUCH CHARGES FROM THE LINE-HAUL CARRIERS.

We concede that the loading and unloading of live stock is a transportation service for which the carrier performing the service is entitled to compensation, but we contend that the collection of such charges for such service must be as specified in the published tariffs then on file.

This question is fully discussed at pages 41 to 44 of petitioners' brief on the merits.

V.

IT IS WHOLLY IMMATERIAL WHETHER THE INCREASED CHARGE OF 25 CENTS PER CAR WAS COLLECTED FROM THE SHIPPER BY THE YARD COMPANY.

In this connection counsel for respondent Director General of Railroads misrepresent the facts with reference to the allegation of plaintiffs' petition and the findings of the Commission.

However, as we pointed out in petitioners' brief on the merits (pp. 20, 26, 27, 28, 29), it is wholly immaterial whether the Stock Yard Company collected and retained said unlawful charges, because the Stock Yard Company and the line-haul carriers, by resorting to the unlawful practice set forth in detail at pages 8 and 9 of petitioners'

brief on the merits, became and were joint tort feasors and jointly and severally liable to make reparation regardless of which of them actually made the collection, and regardless of which of them actually received the benefit therefrom. Counsel for respondent have carefully evaded being drawn into a discussion of the proposition that the line-haul carriers and the Stock Yard Company, by joining in the practice resorted to by them to exact from the shipper the extra 25 cents per car in dispute, were joint tort feasors and jointly and severally liable to make reparation regardless of which of them actaully collected the unlawful charges and regardless of which of them ultimately received the benefit therefrom.

VI.

WHILE THE MAKING AND COLLECTING OF A SEPARATE CHARGE IS IN AND OF ITSELF ALONE NOT AN UNLAWFUL OR UNREASONABLE PRACTICE,—UNDER THE PARTICULAR FACTS AND CIRCUMSTANCES IN THIS CASE THE EXACTION FROM THE SHIPPER OF THE THROUGH TRANSPORTATION CHARGES, INCLUDING THE UNLOADING SERVICE, AS SPECIFIED IN THE PUBLISHED TARIFFS OF THE LINE-HAUL CARRIERS, COUPLED WITH THE FURTHER EXACTION OF AN ADDITIONAL CHARGE OF 25 CENTS PER CAR FOR THE IDENTICAL SERVICE ALREADY COVERED BY THE THROUGH RATES AND CHARGES OF THE LINE-HAUL CARRIERS, WAS BOTH UNREASONABLE AND UNLAWFUL. THE FINDING OF THE COMMISSION IN THIS REGARD IS SUPPORTED BY AMPLE EVIDENCE AND SHOULD BE ACCEPTED BY THIS COURT.

VII.

WHETHER THE PURPOSE OF THE YARD COMPANY IN INSERTING IN PARENTHESIS IN ITS PUBLISHED TARIFFS THE WORDS "AS A CARRIER'S AGENT" WAS TO FORCE THE LINE-HAUL CARRIERS TO PAY THE INCREASED CHARGE OF 25 CENTS PER CAR IS WHOLLY IMMATERIAL. WHATEVER ITS OBJECT AND PURPOSE WAS, IT MUST BE CONSIDERED AND GIVEN THE FORCE AND EFFECT OF LIMITING THE COLLECTION OF THE CHARGES THEREIN CONTAINED AGAINST THE LINE-HAUL CARRIERS.

The effect of the published tariffs of the Stock Yard Company is discussed at some length in petitioners' brief on the merits, pages 63 to 70. Counsel for respondent have significantly refrained from attempting to answer this important part of petitioners' brief. Counsel for respondent have in this connection again found it convenient to misrepresent the finding of the Commission with reference to the question of whether the Stock Yard Company, in performing the loading and unloading service, was acting as the agent or instrumentality of the line-haul carriers. On page 35 they say:

> "The Yards Company was not their agent, and the Commission so found (R. 137)."

Reference to the page of the record cited shows that the Commission made no such finding.

VIII.

THE CONTENTION THAT CONGRESS DID NOT CONSENT THAT THE AGENT APPOINTED BY THE PRESIDENT MIGHT BE PROCEEDED AGAINST BEFORE THE INTERSTATE COMMERCE COMMISSION FOR A TORT COMMITTED BY THE COLLECTION OR ENFORCEMENT, BY OR THROUGH THE PRESIDENT DURING THE PERIOD OF FEDERAL CONTROL, OF RATES, FARES, CHARGES, REGULATIONS AND PRACTICES, IS A NEW POINT NOT NOTICED BY THE DISTRICT COURT OR BY THE CIRCUIT COURT OF APPEALS AND IS WHOLLY UNTENABLE.

This contention is completely refuted by this court in *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554, where it was held that the plain purpose of the provisions of the Federal Control Act was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, and that the courts were to go on entertaining suits and entertaining judgments under existing law, except that the property in the hands of the President for war purposes was not to be disturbed; that subject to that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.

IX.

THE ABSORPTION CLAUSE IN THE PUBLISHED TARIFFS OF THE LINE-HAUL CARRIERS WAS NOT CONCLUSIVE ON THE QUESTION OF THE EXTENT OF THE DUTY OF THE LINE-HAUL CARRIERS TO PAY THE CHARGES OF THE STOCK YARD COMPANY FOR THE UNLOADING SERVICE.

In petitioners' brief on the merits (pp. 54 to 59, inclusive), we point out at some length the reasons why the so-called absorption clause in the published tariffs of the

line-haul carriers cannot be held to limit the obligation of the line-haul carriers with reference to the unloading service to the precise number of cents mentioned therein. Significantly, counsel for respondent have not attempted to answer any of these arguments, nor have they attempted to answer the contention made (pp. 55 and 56 of petitioners' brief on the merits) to the effect that in every case in which the initial carrier in its published tariffs provides that it will absorb or assume terminal charges, switching charges of connecting lines, and the like, the effect thereof is to establish a joint rate, and that such rate must be observed and adhered to by the line-haul carrier until it shall have amended its published tariffs containing such absorption clause in the manner required by paragraph 3 of Section 6 of the Act to Regulate Commerce.

X.

THE POINT MADE THAT THE DISTRICT COURT WAS CORRECT IN HOLDING THAT PETITIONERS HAD NO RIGHT TO MAINTAIN THIS ACTION HAS ALREADY BEEN ANSWERED BY THE BRIEF HERETOFORE FILED IN THIS CAUSE FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE AND BY PETITIONERS' BRIEF ON THE MERITS, SUBDIVISION VII, PAGES 75 TO 96.

XI.

QUESTIONS OF PUBLIC IMPORTANCE SUFFICIENT TO JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI ARE PRESENTED BY THE RECORD IN THIS CASE. WHILE THIS COURT MAY DISMISS A SUIT IN WHICH IT HAS IMPROVIDENTLY GRANTED A PETITION FOR CERTIORARI, THIS IS NOT SUCH A CASE.

ARGUMENT.

I.

IT IS RESPONDENT'S NOT PETITIONERS' CONTENTIONS WHICH ARE LARGELY BASED ON FUNDAMENTAL MISCONCEPTIONS OF THE TRUE FACTS IN THE CASE.

Subdivision I of the respondent's brief squarely raises an issue of fact as to the following propositions:

(a) Whether or not the published tariffs of the line-haul carriers covered the complete transportation of live stock from the point of origin to the Stock Yards, including the unloading at the Yards, in consideration of the line-haul rates plus the $2.00 terminal charge.

(b) Whether or not the Yard Company, in the performing of the unloading service, acted as agent for the line-haul carriers, and whether or not the charges enumerated in its published tariffs of May 21, 1917, (I. C. C. No. 2) applied to the charges which it made in that capacity to the line-haul carriers for loading and unloading live stock for the line-haul carriers at Union Stock Yards, Illinois, or whether the application of said charges was directed against the shipper.

(c) Whether or not the determination by the Commission of the questions involved in this case involved the exercise of administrative functions on the part of the Commission, in particular the question of whether or not, under the particular facts and circumstances existing at Union Stock Yards, Illinois, and the usages and customs existing at said terminal station, it was the duty of the line-haul carriers to load and unload live stock at that terminal point.

Fundamental Difference Between Contentions of Petitioners and Respondent.

A fundamental difference between the contentions of petitioners and the contention of respondent Director General is this: Respondent contends that the Yard Company, in performing the loading and unloading service in question, was acting in a separate and distinct capacity from that of the line-haul carriers and performed a distinct and separate service from the service which the line-haul carriers in their published tariffs held themselves out to perform; that the situation in this case is exactly the same as in the case of an initial common carrier and a connecting common carrier where no through rate has been established and where the initial carrier and the connecting carrier each publish their separate tariffs, restricted to the services respectively performed by each. On the other hand, petitioners contend that it was the duty of the line-haul carriers, by virtue of paragraphs 3 and 4 of Section 1 of the Act to Regulate Commerce, to completely cover in their published tariffs complete rates and charges for every service incident to the transportation of live stock, covering all "instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof;" that the line-haul carriers in the instant case, recognizing such to be their duty, and in their published tariffs established a through line-haul or commodity charge on live stock consigned to Union Stock Yards, Illinois, and in such through line-haul rates, plus $2.00 per car terminal charge, included reimbursement to themselves for the expense incurred in the loading and unloading of live stock incidental to such shipments.

The contention of respondent is sustained by no authorities cited. Our contention is sustained by the spirit and letter of paragraphs 3 and 4 of Section 1 of the Act to Reg-

ulate Commerce and by what this court has said with reference to the interpretation of said paragraphs.

In *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588, this court, after referring to paragraph 3 of Section 1 of the Act to Regulate Commerce, says, at page 594:

> "From this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like."

The same language is used by this court in *Erie Railroad Co.* v. *Shuart*, 250 U. S. 465, at pages 467 and 468.

As we have heretofore pointed out in petitioners' brief on the merits (pp. 44 to 51), the line-haul carriers treated the loading and unloading service as a part of the general transportation undertaken by them in their published tariffs by covering such loading and unloading service in the flat Chicago rate plus the $2.00 per car terminal charge. Consistent with the undertaking, rates and charges of the line-haul carriers in this respect, the Yard Company, so as to prevent a double charge against the shipper, in formulating its tariff of May 21, 1917, provided that the charges in its published tariffs were for services rendered by it "as a carrier's agent."

A. THE UNCONTRADICTED TESTIMONY ESTABLISHES THE FACT THAT BOTH IN THE FLAT CHICAGO RATE AND IN THE $2.00 PER CAR TERMINAL CHARGE WAS INCLUDED COMPENSATION TO THE LINE-HAUL CARRIERS FOR LOADING AND UNLOADING LIVE STOCK AT THAT POINT.

In petitioners' brief on the merits we specifically point out (pp. 4, 5, 44, 45, 46, 47) the testimony and documentary proof which shows beyond a shadow of a doubt that the flat Chicago rate to the Union Stock Yards, plus the $2.00 per car terminal charge, in the published tariffs of the line-haul carriers, covered the through transportation of live stock to the Union Stock Yards, including the unloading thereof. The testimony and the proof referred to are not requestioned by respondent. Opposing counsel are content with the mere statement that the testimony before the Commission shows that neither the line-haul rates nor the $2.00 terminal charge covered compensation to the line-haul carriers for unloading. They, however, are unable to refer to any testimony or documentary evidence which supports this unwarranted statement.

INDISPENSABLE TO RESPONDENTS POSITION THAT EFFECT OF FINDINGS OF FACT BY COMMISSION BE DESTROYED.

Counsel for both respondents, the Yard Company and the Director General, fully realize that in order to sustain the judgment of the Circuit Court of Appeals on the grounds stated in its opinion, it is indispensable that they destroy the force and effect of the finding of the Commission that the line-haul rates to Union Stock Yards, Illinois, plus the $2.00 per car terminal charge in the published tariffs of the line-haul carriers, covered the through transportation of live stock to that station and included unloading (R. 144). This they seek to do by attempting to persuade this court, as they did the Circuit Court of Appeals, (1) that the so-called classifications in the published tariffs of

the line-haul carriers, which provide that it shall be the duty of the shipper to load and unload his live stock, applied to shipments of live stock consigned to Union Stock Yards, Illinois; (2) that the commodity or line-haul rate and said $2.00 per car terminal charge had nothing whatever to do with the question; (3) that in determining the question here involved the court must look to the classifications and absorption clause in the published tariffs of the line-haul carriers, and from such classifications and absorption clause alone determine the respective rights, undertakings and obligations of the line-haul carriers and the shippers with reference to the loading and unloading of live stock at Union Stock Yards, Illinois.

Carefully analyzed, the contention of respondent Director General amounts to this: That before the tariffs of the Yard Company increasing the unloading charge were filed on May 21, 1917, the entire amount of the charges against the shipment for the unloading service at Union Stock Yards, Illinois, was taken care of by the absorption clause in the tariffs of the line-haul carriers, but that after said increased tariffs were filed, 25 cents of the total 50-cent unloading charge of the Yard Company was taken care of by force of the so-called absorption clause in the published tariffs of the line-haul carriers, and the remaining 25 cents of said charge was automatically or by operation of law assessed against the shipper on the authority of the classifications. In other words, the contention seems to be that before May 21, 1917, the so-called classifications had no application whatever to shipments of live stock consigned to Union Stock Yards, Illinois, but after May 21, 1917, they automatically applied and became effective as to every shipment of live stock consigned to that terminal market,—not entirely, but only to the extent of furnishing the basis to exact the controversial 25 cents per car from the shipper.

The question here involved concerns not the question of whether the line-haul carriers in their published tariffs charged the shippers enough to reimburse the line-haul carriers for the increase of 25 cents per car in the charge made by the Yard Company for the unloading service, but whether, in the condition of the published tariffs of the line-haul carriers and the Yard Company on file when the charges in question were collected, there was any lawful authority to collect such additional charge from the shipper.

The record clearly establishes that not only was the original charge of 25 cents per car for the unloading service contained in the $2.00 per car terminal charge, but that there was also contained in the structure of the line-haul rates the commodity charge to Union Stock Yards, Illinois, an amount for reimbursement to the line-haul carriers on account of the unloading service. That this is true is clearly shown by the record before the Interstate Commerce Commission and is nowhere disputed. (See Original Ex. 7, p. 1053; *Board of Trade* v. *C. & A. R. R. Co.*, 3 I. C. C. 235, Original Ex. 7, p. 1044; *Chicago Live Stock Exchange* v. *C. G. W. Ry. Co.*, 10 I. C. C. 428, Original Ex. 7, p. 1055; *Cattle Raisers' Assn.* v. *Fort Worth & Denver City R. Co.*, 7 I. C. C. 513, Original Ex. 7, p. 1040.)

The cases before the Commission above cited were particularly called to the attention of the Commission during the hearings before the Commission. These cases all involved increases in rates on live stock and show beyond question that the line-haul carriers, in asking for such increases in their line-haul rates, specifically included reimbursement to themselves on account of the loading and unloading service.

Classifications Did Not Apply To Shipments Consigned To Union Stock Yards, Ill. To Which Station a Through Rate Had Been Established.

In petitioners' brief on the merits, in subdivision IV, (pp. 51 to 59), we show that while the provisions of Official Classification No. 44 and Western Classification No. 54, providing "the consignor and consignee are responsible for the loading and unloading of the same, the carrier assuming no liability whatever in regard to the loading and unloading," apply to outlying intermediate stations and to stations for which a specific flat through rate or charge had not been made. Such classifications never were applied, and could not be applied, to live stock consigned to the Union Stock Yards in Chicago, because as to that particular situation the published tariffs provided a definite through commodity rate, plus a $2.00 per car terminal charge, which included the unloading service. (See specific finding of the Commission on this subject, R. 144; also testimony of respondent's witness Beyers, Certified Excepts from Original Exhibits, p. 117; also Certified Excerpts from Original Exhibits, pp. 167-169, 171, 172.) Counsel for respondent make no attempt to answer petitioners' brief on this most important proposition.

A Through Rate To a Given Station Always Supersedes General Classifications.

In petitioners' brief on the merits (p. 53) we refer to the rule well established by the Commission and affirmed by the courts, that where a line-haul rate or commodity rate is named in the tariffs with reference to a particular station, such line-haul or commodity rate is the legal rate and supersedes all classifications. Opposing counsel have also wisely ignored this portion of petitioners' brief. It is indeed dangerous ground for respondents.

RESPONDENT IS SILENT REGARDING FLAT INCREASES IN LINE-HAUL RATES AGGREGATING MORE THAN 40%.

It is also most significant that in this connection neither counsel for respondent Yard Company nor counsel for respondent Director General say a single word in their briefs in answer to the portion of petitioners' brief on the merits (p. 75) wherein we point out that the line-haul rates of the carriers, which in part included the expense incurred by the line-haul carriers in paying the Yard Company for the unloading service, were increased three successive times, the first increase being 5 per cent, the second increase being 15 per cent, and the third increase being 25 per cent of the then existing rates.

PETITIONERS POSITION BASED ON SPECIFIC FINDINGS OF FACT BY COMMISSION.

Our position is bottomed on the finding of the Commission (R. 144), "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for years constituted the through charge and included the delivery of live stock to the consignee at the Stock Yards." The position of respondents is dependent on their ability to convince this court that a situation which had existed for more than 50 years, whereby the line-haul carriers assumed to handle the entire expense of loading and unloading live stock at the Union Stock Yards in consideration of their line-haul rates and $2.00 per car terminal charge, could be changed without any change being made in the published tariffs of the line-haul carriers.

B. THE CONTENTION OF RESPONDENT DIRECTOR GENERAL OF RAILROADS THAT THE YARD COMPANY WAS NOT AN AGENT OF THE LINE-HAUL CARRIERS IN THE LOADING AND UNLOADING OF LIVE STOCK AT THE UNION STOCK YARDS IS CLEARLY REFUTED BY THE RECORD.

In this connection counsel for respondent Director General of Railroads obscure the point in issue by contending that the Yard Company was not the agent of the line-haul carriers *in publishing and filing its tariffs.* We have never contended that the Yard Company was acting as the agent for the line-haul carriers *in the publication of its tariffs.* The filing of its tariffs was solely a matter between itself and the government, for which it needed no authority from the line-haul carriers. On the other hand, the actual loading and unloading of live stock at the Union Stock Yards and the charges which it made for that service was wholly a matter between itself and the line-haul carriers for which it performed that service.

YARD COMPANY IN PERFORMING LOADING AND UNLOADING SERVICE DID SO AS AGENT FOR LINE-HAUL CARRIERS.

The uncontradicted fact is that the Yard Company was *created by the line-haul carriers* in the year 1865 as a convenient agency or instrumentality for the loading and unloading of live stock in connection with shipments made by the line-haul carriers to and from the Union Stock Yards and from the time of its organization, continuously acted as agent for the line-haul carriers, not only in loading and unloading live stock consigned from and to the Union Stock Yards, but in guaranteeing and collecting the entire transportation charges of the line-haul carriers, including the amount which the line-haul carriers in their rates imposed against the shipper for the loading and unloading service (R. 22-23, 127, 128,

144). There is no contention made by respondent that from 1865 up to the time of the passage of the Act to Regulate Commerce the actual relation of the Yard Company to the line-haul carriers was strictly that of agent; the contention of respondent rests upon the premise, wholly unsupported by reason or authority, that the passage of the Act to Regulate Commerce *ipso facto* changed the capacity in which the Yard Company acted in performing the loading and unloading service at the Union Stock Yards, and that thereafter the Yard Company, although acting in identically the same manner as before the passage of the Act, was no longer an agent for the line-haul carriers, but a principal in the transaction, having no relation to the line-haul carriers other than that of an ordinary connecting carrier.

INTERSTATE COMMERCE ACT DID NOT ABROGATE RELATION OF PRINCIPAL AND AGENT BETWEEN LINE-HAUL CARRIER AND TERMINAL CARRIER.

When the Yard Company filed its tariffs the rates and charges therein contained were the same as the rates and charges against the line-haul carriers had been before the passage of the Act. Its services and its relation to the line-haul carriers remained identically as before. The sole and only change was that the Yard Company, after the passage of the Act, was required to make public the amount it charged the line-haul carriers for aiding them in completing the through transportation service which the latter in their published tariffs undertook. The method to make public such matters is provided in Section 6 of the Act to Regulate Commerce. There is not contained in the Act to Regulate Commerce any language which indicates that it was the intent of the Congress to change or modify the relation existing between the line-

haul carriers and the agencies or instrumentalities through which the line-haul carriers performed certain incidental services connected with the transportation of property.

Respondent's Explanation of Wording of Tariffs of Yard Company Not Convincing.

On page 52 of brief of respondent Director General it is said, in referring to the reason why the Yard Company, in filing its published tariffs, specified that its rates and charges were (as a carrier's agent):

> "The Yard Company was attempting to relieve itself of the responsibility of a common carrier in order to force the line-haul carriers to assume payment of its charges and relieve the shippers who were its customers of such duty."

This subtle explanation is extremely weak. It is apparent that the Yard Company, in filing its tariffs, did so because, as a common carrier subject to the provisions of the Act to Regulate Commerce, it was compelled to do so. The clear intent of the language used was to make the rates and charges in the tariff of the Yard Company a matter wholly between the Yard Company and the line-haul carriers, as it had always been. The part of the statement that the action of the Yard Company in so filing their tariffs was to relieve the shipper, *who were their customers,* of such duty, is extremely specious when we consider the uncontradicted fact that the shippers were never customers of the Yard Company, had no business relations whatever with the Yard Company, and sustained no relation of privity to the Yard Company.

The wording of the tariffs of the Yard Company, consistent with the position then taken by the Yard Company was that the extra 25 cents per car was not a charge of the Yard Company against the shipper but purely a charge of the line-haul carriers to be collected by the Yard

Company as agent for the line-haul carriers. (Cert. Excerpts Or. Exhibits pp. 25-35)

But whatever may have been the reason which actuated the Yard Company in so wording its tariffs, the fact remains that they were so worded and must so be construed.

QUESTION OF AUTHORITY OF YARD COMPANY TO WORD ITS TARIFFS AS IT DID IS WHOLLY IMMATERIAL.

The Yard Company's tariff does not state that it is *filed and published* as "a carriers agent". *It states that the charges therein contained are its charges as a carriers agent and clearly were intended to limit the application of said charges to the line-haul carriers.* The question of the authority of the Yard Company to so limit the application of its charges does not effect the question of the right of respondents to exact the extra 25 cents per car from the commission men without tariff authority.

COMMISSION DID NOT FIND THAT YARD COMPANY WAS NOT AGENT FOR LINE-HAUL CARRIERS.

On page 53 of the brief of respondent Director General it is said:

> "That the Yard Company was not the agent for the line-haul carriers was found by the Commission in its first opinion. (R. 137)."

In the first place, the reference "R. 137" is to a part of the first report of the Commission which was subsequently reversed and discarded. In the second place, it is not true that the Commission in its first opinion held that the Yard Company was not the agent of the line-haul carriers (R. 137). In this connection counsel for respondent Director General concede, on page 53 of their brief, that the Yard Company, in performing many of the services, set forth in Petitioners Brief on the Merits at pp. 10-11, and in col-

lecting all of the charge in the freight-bills of the line-haul carriers, *except the controversial 25 cents per car*, was acting as their agent. It is also said that the services rendered by the Yard Company in counting the stock, checking their condition, unloading the same, and making a record of the dead and injured, were services which the Yard Company performed for itself for its own protection and in its own interest, in order that it might defend against any loss, damage or injury to an interstate shipment in a suit brought by the shipper against it. This contention, however, has no support in the record. On the contrary, the record conclusively shows that the services referred to were performed by the Yard Company for the use and benefit of the line-haul carriers, and that for such services the Yard Company was compensated by the loading and unloading charge. (Certified Excerpts from Original Exhibits, pp. 45-61-64.)

C. THE DETERMINATION OF THE QUESTIONS INVOLVED CALLED FOR THE EXERCISE OF ADMINISTRATIVE ACTION ON THE PART OF THE COMMISSION.

Counsel for respondent Director General strenuously insist that the only question before the Commission was the legal construction, force and effect of the so-called classifications and the so-called absorption clause in the published tariffs of the line-haul carriers; that neither these classifications, nor the language of said absorption clause, were voluminous, complicated or ambiguous. In this connection they say that the tariffs of the line-haul carriers covering the line-haul rates were not offered in evidence, but that the substance of the tariffs of the line-haul carriers, the substance of the classifications referred to, and the substance of the so-called absorption clause, were shown by the oral testimony of tariff experts who testified on the subject. It is not contended that the Commission did not

have properly before it everything which was essential to a proper determination of the questions involved, and no such complaint is made by respondents.

It is evident that counsel for respondent Director General refer to the fact that the complete tariffs of the line-haul carriers and of the Yard Company were not introduced in evidence before the Commission or in the District Court, in order to combat the fact that the tariffs were voluminous and complicated. The questions involved did not necessitate the introduction in evidence before the Commission of the full and complete published tariffs of the line-haul carriers and of the Yard Company. The only material questions involved concerning the tariffs of the line-haul carriers were:

1. Whether the line-haul carriers in their published rates and charges had established a through rate on live stock to the Union Stock Yards, Illinois;

2. Whether said through line-haul rates plus the $2.00 per car terminal charge included compensation to the line-haul carriers on account of the loading and unloading service.

These questions were purely questions of fact. The affirmative of both of said questions was established by witnesses without the slightest dispute or contradiction. The fact that respondents did not offer in evidence in the District Court, the complete tariffs of the line-haul carriers and the Stock Yard Company conclusively shows that their contention now that this case turns entirely upon a purely legal question, viz.: the meaning of the language of said published tariffs is an afterthought to bolster up the opinion of the Circuit Court of Appeals.

ULTIMATE CONCLUSION OF COMMISSION INSEPARABLY CONNECTED WITH ITS FINDINGS OF SPECIFIC FACTS.

As we have heretofore pointed out in petitioners' brief on the merits (pp. 32 to 38), the determination of the case before the Commission did not turn on the phraseology of the provisions of published tariffs but involved the determination of the many purely questions of fact, which we enumerate on pp. 35-36-37.

PRACTICE CONDEMNED BY COMMISSION WAS NOT THE MERE MAKING OF A SEPARATE CHARGE FOR THE LOADING AND UNLOADING SERVICE.

Counsel for respondent Director General of Railroads confuse the situation by seeking to make it appear that the Commission held in the instant case that the charge for the loading and unloading service must, under the statute, be included in the line-haul rates and that the mere making of a separate charge for a terminal service, such as loading and unloading; was unlawful. The report of the Commission is not subject to such interpretation. Taking as a whole the language of the report of the Commission of July 15, 1920, it is obvious that the Commission had no thought of holding a terminal service such as loading and unloading may not properly be included in the tariffs of the line-haul carriers as a separate item or charge in addition to the line-haul charges. The continued approval of the $2.00 per car terminal charge as a separate charge in the tariffs of the line-haul carriers refutes the meaning ascribed to the order by counsel for respondent. The essence of the report of the Commission is that in view of the situation existing at the Union Stock Yards with reference to the loading and unloading of live stock, the history of the loading and unloading service, and the nature of the service, it was the duty of the line-haul carriers to unload

live stock at that point; that inasmuch as the line-haul rates in the published tariffs of the line-haul carriers, plus a charge of $2.00 for switching or terminal service, constituted the through charge and included delivery of live stock to the consignee at the Stock Yards, it was both an unreasonable and unlawful practice for the line-haul carriers and the Yard Company to settle a controversy between themselves as to the controversial 25 cents per car contained in the published tariffs of the Yard Company by adding that amount to the freight bills of the line-haul carriers, figured on the basis of the line-haul rates plus the $2.00 per car terminal charge specified in the published tariffs of the line-haul carriers, and thus pass the burden of said controversy on to the shipper.

For counsel for respondent Director General of Railroads to attempt to make it appear that the practice condemned by the Commission was that the charges for the loading and unloading were set up as separate charges in the published tariffs is unfair and misleading.

QUESTION OF REASONABLENESS IN AMOUNT OF RATES OF YARD COMPANY AND LINE-HAUL CARRIERS WHOLLY IMMATERIAL IN THIS CASE.

It is urged by counsel for the Director General that inasmuch as the Commission did not condemn as unreasonable or unlawful the loading and unloading charge in the published tariffs of the Yard Company, and did not condemn as unreasonable or unlawful the rates and charges set forth in the published tariffs of the line-haul carriers, it was impossible for any practice resorted to by the line-haul carriers and the Yard Company to collect such charges to be either unreasonable or unlawful. This contention entirely obscures the fact that the through line-haul rates in the published tariffs of the line-haul carriers in and of

themselves alone included the unloading of live stock at the Union Stock Yards, and that in the absence of a change in such published tariffs the controversial 25 cents per car set forth only in the published tariffs of the Yard Company could not be exacted from the shipper. (Petitioners Brief on the Merits, pp. 73-74)

Such contention also loses sight of the fact that the rates and charges in the published tariffs of the Yard Company were therein stated to be the rates and charges of the Yard Company *"as a carrier's agent."*

The rates and charges of the Yard Company *thus restricted* as rates and charges against the line-haul carriers for its services as their agent, may have been both reasonable and lawful. On the other hand, the rates and charges in the published tariffs of the line-haul carriers for the through transportation of live stock to the Union Stock Yards, including the unloading thereof, in and of themselves may have been both reasonable and lawful. But, when the line-haul carriers and the Yard Company, by the practice resorted to by them to settle their controversy with reference to the extra 25 cents per car, tacked together their rates and charges and saddled them on the shipper, the shipper was in fact subjected to a double charge for the same service.

II.

UNDER THIS SUBDIVISION COUNSEL FOR THE RESPONDENT DIRECTOR GENERAL OF RAILROADS SEEK TO PERSUADE THIS COURT TO INQUIRE AS TO THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE FINDING OF THE COMMISSION THAT IT WAS THE DUTY OF THE LINE-HAUL CARRIERS UNDER THE PARTICULAR FACTS AND CIRCUMSTANCES IN THE INSTANT CASE TO LOAD AND UNLOAD LIVE STOCK AT THE UNION STOCK YARDS IN CHICAGO.

Opposing counsel delight in quoting certain portions of the reversed and discarded report of February 15, 1919. All of the findings quoted by counsel for respondent on page 60 were afterwards reversed by the Commission in its report of July 15, 1920. We had always supposed that when the Commission granted a rehearing and heard additional testimony and reversed its previous findings, such previous findings were, to all intents and purposes, out of the case.

That this court will not weigh and consider the testimony before the Commission on questions of fact to determine where the weight of the evidence lies, is so thoroughly established that we need say nothing further than to refer to the rule.

Facts Were Nor in Dispute Before Commission—Respondents Make Them in Dispute Here.

Under this subdivision counsel for respondent say they agree with the statement of the Commission (R. 144) that "the facts in this case are not in dispute." As a matter of fact, the record before the Commission shows that the facts were not there in dispute. That condition, however, has changed since present counsel for Director General (who

were not counsel before the Commission) have entered the case. Now it is apparent that the facts are very much in dispute. To substantiate the assertion, we point to the briefs of opposing counsel where they deny the existence of almost every finding of fact by the Commission upon rehearing.

Section 15 of Transportation Act Has No Bearing on This Case.

It is argued by counsel for respondent Director General that the enactment by the Congress of paragraph 5 of Section 15 of the Transportation Act of 1920, providing:

> "transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stock yards, shall include all necessary services of unloading and reloading en route, delivery at public stock yards of inbound shipments in suitable pens and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner,"

was an indication on the part of Congress that the law previous to the enactment of the Transportation Act of 1920 did not impose such duty on the line-haul carriers. This argument is not persuasive. In the first place, the decision of the Commission that it was the duty of line-haul carriers transporting live stock to the Union Stock Yards in Chicago to load and unload live stock at that point was not an enunciation of any rule of law on that subject. The finding of the Commission was limited to the duty of loading and unloading live stock at the Union Stock Yards, Ill. under the particular facts and circumstances existing at that particular point, including the history of that part of the transportation service, the inclusion in the flat through Chicago rate and the $2.00 terminal charge of compensation to the line-haul carriers for the expense of that service, and the

many other questions of fact hereinabove referred to particularly relating to the conditions existing at the Union Stock Yards.

The argument of opposing counsel is also clearly untenable for the following reasons:

First: Because the mere fact that Congress, in enacting a detailed and comprehensive transportation act, included in the act provisions which, before that time, were clearly established by decisions of the Supreme Court of the United States, cannot logically be urged as a reason for saying that the Congress was of the opinion that none of the provisions of the act were already the law as the result of judicial decisions. It might more logically be argued that if Congress had omitted from the transportation act the provisions above mentioned, such omission would have shown the intent on the part of Congress to wipe out the effect of the decisions of the Supreme Court of the United States in the *Covington case,* 139 U. S. 128, and in the *Union Stock Yard case,* 226 U. S. 286.

Second: In the *Covington* case, 139 U. S. 128, and in the *Union Stock Yard* case, 226 U. S. 286, the rule was laid down that it was the duty of the carrier, as a part of the general transportation service, to load and unload live stock at two large public stock yards, namely, the stock yards at Covington, Kentucky, and the stock yards at Chicago, Illinois. The amendment to Section 15 of the Transportation Act goes further and provides that such general transportation charge shall include unloading and reloading en route, and at non-terminal stations as well as delivery at large terminal public stock yards. It extends the rule specifically applied by this Court in the *Covington* case to a large terminal station, to all stations, both terminal and en route.

MUCH TESTIMONY WAS HEARD AND A GREAT MASS OF EVIDENCE WAS INTRODUCED BEFORE THE COMMISSION AFTER IT HAD MADE ITS FIRST REPORT.

Under this subdivision counsel for respondent place great stress on the language used by the Commission in its first report (R. 138):

> "In the absence of tariff provisions to the contrary, this is a separate and distinct service not included in the transportation rate."

When the Commission, after the filing of its first report, granted a rehearing with reference thereto, a great mass of testimony was introduced showing conclusively and without contradiction that the published tariffs of the line-haul carriers, covering shipments of live stock to Union Stock Yards, Ill., then and at all times included all expense incurred by the line-haul carriers in the loading and unloading of live stock at Union Stock Yards, Ill. On rehearing, it was conclusively shown that such service was included in the transportation rate to Union Stock Yards, Ill., and the Commission expressly found (R. 144), "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, has for many years constituted the through charge and included delivery of live stock to the consignee at the stock yards."

III.

THE SPECIFIC FINDING OF THE COMMISSION THAT THE STOCK YARDS WERE THE TERMINALS OF THE LINE-HAUL CARRIERS WAS AMPLY SUSTAINED BY THE EVIDENCE BEFORE THE COMMISSION—IN FACT, THERE WAS NO EVIDENCE TO THE CONTRARY.

Here, again counsel for respondent seek to induce this court to pass upon the sufficiency and weight of the evidence before the Commission.

In the report of the Commission of February 11, 1919 (R. 139, 140), the Commission specifically found as a matter of fact (R. 139):

> "8. The Stock Yards are the terminals for the receipt and delivery of live stock of the railroad utilizing them."

In the same report the Commission (R. 134) says:

> "The Stock Yards are, however, in fact a terminal for the receipt and delivery of live stock; that is one of the purposes for which they were created and one of the uses to which they are now put."

In its subsequent report of July 15, 1920, the Commission, referring to the facts on this subject, again finds (R. 145):

> "Under this state of facts we are of the opinion and find that the Stock Yards are in effect terminals of the line-haul carriers, the Junction Company, and the Stock Yard Company."

The question of the relationship between the line-haul carriers and the Stock Yard Company and the manner in which the Stock Yards' facilities are utilized by the line-haul carriers are both matters of fact amply supported by the evidence before the Commission. It is clear that in the determination of a question of fact that the loading and unloading chutes of the Stock Yard Company were in fact the terminals of the line-haul carriers in the shipment of

live stock was not beyond the constitutional or statutory power of the Commission. Under such circumstances, the determination of that question of fact by the Commission was not subject to review by the Circuit Court of Appeals (*Standard Oil Co.* v. *United States*, 283 U. S. 235; *Interstate Commerce Commission* v. *Delaware L. & W. R. R. Co.*, 220 U. S. 235; *United States* v. *Louisville & N. R. R. Co.* 235 U. S. 314; *Proctor & Gamble* v. *United States*, 225 U. S. 283.) In this connection we invite the attention of this court to the testimony of H. W. Beyers, a freight traffic expert (Orig. Ex. 7, p. 1252—Certified Excerpts from Original Exhibits, pp. 171, 172). Mr. Beyers testified:

> "The Lowrey Tariff indicates the Union Stock Yards as a station on the Chicago Junction Railroad at which are located industries, team tracks and freight houses. In order to determine a rate on live stock to the Union Stock Yards, Chicago, there is indicated the application of rate base No. 6 (see rate bases and facilities referred to with reference to the Union Stock Yards, Illinois, as a station—Certified Excerpts from Original Exhibits, p. 167). Rate base No. 6 advertises the application on inbound movements of the Chicago rate plus a terminal charge of $2.00 per car to and from industries, chutes and sidings. * * * Under this tariff the shipper has before him everything that enters into the transaction of taking a car to the chutes or sidings at the Union Stock Yards and indicates to the shipper that his charge will be the flat Chicago rate plus $2.00 per car terminal charge, and that the carriers, as indicated, will pay the charges of the Union Stock Yard and Transit Company for loading and unloading which was the situation up to the time that the Union Stock Yard and Transit Company changed their tariff basis by advancing it 25c per car both in the matter of loading and unloading charges."

In the consideration of this phase of the case it must at all times be remembered that there is no dispute whatever as to the fact that the published charges of the line-haul carriers all fixed a base rate or commodity rate to the Union Stock Yards, Illinois (Excerpts from Original Exhibits,

pp. 167, 169, 171, 172) and that the line-haul rates to Chicago plus a charge of $2.00 for terminal or switching service constituted the through charge and included the delivery of live stock to the consignee at the Stock Yards (R. 144), up to May 21, 1917 when the Yard Company filed its tariffs increasing its charges.

Union Stock Yards, Ill., Was a Terminal Station Named in Tariffs of the Line-Haul Carriers.

Counsel for respondent Director General strenuously deny our assertion that Union Stock Yards, Illinois, was specifically named in the tariffs of the line-haul carriers as a station to which the base rate or commodity rate applied. That our assertion is correct is indisputably shown by testimony of the tariff expert who testified in behalf of respondent before the Interstate Commerce Commission (Certified Excerpts from Original Exhibits, pp. 171, 172). That fact is also shown by tariff sheet reproduced on page 167 of Certified Excerpts from Original Exhibits. The fact that Union Stock Yards, Illinois, was located on the tracks owned by the Chicago Junction Railway and beyond the rails actually owned by the line-haul carriers is immaterial. The evidence shows that the Chicago Junction Railway owned and operated no engines, cars, or other rolling stock facilities, and had no crews with which to operate the same. The line-haul carriers, in consideration of a trackage charge paid by them to the Chicago Junction Railway, used the tracks of the Junction Railway exactly the same as they used their own, hauling their own trains, with their own crews, over said tracks. The line-haul carriers in their published tariffs treated the Chicago Junction Railway as a part of their own facilities, which it, in fact, was.

Ownership of trackage rights by a railroad is tantamount to "owning its own line" (24 I. C. C. 96, 112) and is "in practical and legal effect the substantial equivalent of an extension of its rails" (62 I. C. C. 261, 267).

The provisions of the Act to Regulate Commerce apply with the same force and effect to the use of facilities not owned by the line-haul carrier but acquired by contract or lease as to facilities which are owned by the carrier originating the shipment. *It is the undertaking of the originating line-haul carrier in its published tariffs to transport live stock to a given destination and the setting up in said published tariffs of through rates and charges for such through transportation service which is of controlling importance.* The question of the ownership of the various facilities incident to such through transportation is wholly immaterial so far as the question here involved is concerned.

IV.

WE ADMIT THE YARD COMPANY WAS A COMMON CARRIER SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION AND THAT IT WAS BOUND TO OBSERVE ALL OF THE TERMS, PROVISIONS AND RESTRICTIONS CONTAINED IN ITS PUBLISHED TARIFFS.

While we admit that the Yard Company was, because of the services which it performed in the loading and unloading of live stock as outlined in the opinion of this court in *United States* v. *Union Stock Yards*, 226 U. S. 286, a common carrier subject to the provisions of the Act to Regulate Commerce, it does not follow that in the performing of the loading and unloading service in question it had a separate and independent status with reference to the performance of that service. (See Petitioner's Brief on the Merits,

pp. 59-60-61.) As pointed out by counsel for respondent in their brief (p. 66):

> "The stock could only reach the market by going over the docks into the chutes and through the passageway of the Stock Yards to the sales pens. * * * Such services could be performed by no other carrier and constituted a part of the transportation to the final destination in the sales pens."

The thing which counsel for respondent omits to state in this connection is that the line-haul carriers in their published tariffs not only undertook to employ the facilities owned by them in carrying out their contract of through and complete transportation of live stock to the Union Stock Yards, Ill. with the shipper, but it undertook to furnish as an integral part of said through transportation the facilities of the Junction Company and the Stock Yard Company, and included in its published rates and charges for such through and complete service compensation to itself for the use of its own facilities and the use of the facilities of the Junction Company and the Stock Yard Company.

On page 67 of the brief of respondent, Director General, this significant admission is made with reference to the service rendered by the Yard Company:

> "Its transportation service was a part of the through transportation of live stock from point of origin to destination in the sales pen of the consignee. * * * The Yard Company was a necessary link in such transportation. Without its facilities and service the transportation and delivery could not be completed."

The transportation and delivery above referred to by counsel for respondent, Director General is obviously, the transportation and delivery undertaken by the line-haul carriers in their published tariffs and covered by base rate or commodity rate No. 6, namely, the flat Chicago rate, plus the $2.00 per car terminal charge.

Counsel for respondent Director General, on page 68 of their brief, in referring to the Yard Company, say:

> "When it increased its charges and the line-haul carriers refused to amend their tariffs and absorb the increased amount, it was bound to collect the same from the party for whom it performed the service."

As we have heretofore pointed out, the loading and unloading service for more than 50 years continuously had been performed by the Yard Company as the agent or instrumentality of the line-haul carriers. Therefore, since, as opposing counsel say, the Yard Company was bound to collect the same from the party for whom it performed the service, it necessarily follows that the Yard Company could not collect its charges from the shipper *with whom it had no relation or privity, by contract or otherwise.*

Opposing counsel, on page 68, further say, in referring to the Yard Company:

> "It could not collect from the line-haul carriers because their tariffs did not permit them to pay the increased amount."

We may here appropriately add that it, the Yard Company, could not collect from the shippers or their consignees because the charges in the published tariffs of the Yard Company were stated to be its charges "as a carrier's agent." But the question in this case is not whether the tariffs of the line-haul carriers permitted them to pay the extra 25 cents per car. The question is whether, under all the facts and circumstances of this case, the collection of the extra 25 cents per car from the commission men was justified, either on the authority of the published tariffs of the line-haul carriers on file, or by the published tariffs of the Yard Company.

We submit that if, as opposing counsel strenuously contend, the tariffs of the Yard Company covering its charges

were based on the separate and independent status of the Yard Company and on a separate and distinct service it was performing, the provisions of the absorption clause in the tariffs of the line-haul carriers could have nothing to do with the question as to whom the Stock Yard Company was bound to collect from. That question must be determined solely by the provisions of its own tariffs.

CARRIERS ARE REQUIRED TO OBSERVE CONDITIONS AND RESTRICTIONS IN THEIR PUBLISHED TARIFFS.

We do not question the rule of law as contended for by opposing counsel, "that carrier's tariffs furnish the legal rate to be collected and the carrier is bound to enforce its tariffs," as written. (*Louisville & Nashville Ry. Co.* v. *Maxwell,* 237 U. S. 94; *Louisville & Nashville Ry. Co.* v. *Central Iron Works,* 265 U. S. 59.) We go further and state that the carrier is not only restricted by its published tariffs regarding the *amount* it shall collect, but is also restricted by provisions of its published tariffs with reference to the question of *from whom it shall collect such charges.* (See *Davis* v. *Henderson,* 266 U. S. 92.)

As we have heretofore pointed out in petitioners' brief on the merits (pp. 71-72), the legal rate is not made by statute the lawful rate; that although under Section 6 of the Act to Regulate Commerce the shipper is bound to pay and the carrier is required to collect the exact amount of its published rates and charges, no more and no less, nevertheless the right to recover reparation still exists as to any unreasonable or unlawful charge exacted. (*Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.,* 284 U. S. 370.) Nor do we question the contention of counsel for respondent that the Yard Company could not be required to perform the loading and unloading service in question with-

out compensation. That this is the law can admit of no doubt. Nevertheless, the exaction of the controversial 25 cents per car from petitioners in this case was unlawful, because among other reasons the published tariff of the Yard Company restricted the application of its rates and charges for the loading and unloading service to the line-haul carriers for whom it performed such service as agent and the Yard Company was compelled by law to observe this restriction as well as every other provision in its published tariffs and because in their published tariffs the line-haul carriers provided through rates covering said service.

Respondent's Inability to Understand Wrong Committed Based on Refusal to Notice All of the Facts.

On page 69 of the brief of respondent, Director General of Railroads, it is naively said:

> "It is difficult to understand how it (the Yard Company) could be guilty of a wrong in collecting the charge from the party for whom the transportation service was rendered and also difficult to understand how the Director General could be guilty of a wrong in inserting the Yard Company's charges in the composite bill of the Yard Company and the line-haul carrier covering the freight and unloading charges, such bill specifically stating the 25 cent charge to be that of the Yard Company and assessed under its tariff."

The alleged difficulty of opposing counsel to understand is based on their unwillingness to admit the facts. When the Yard Company in the first instance, after it had increased its loading and unloading charges, refused to collect the increased charge from the shipper, because by the actual wording of its published tariffs the collection of its charges for the loading and unloading service were restricted to the line-haul carriers, it had no difficulty in thoroughly understanding the wrong which it would commit in collecting the charge from the shipper. This phase

of the matter is discussed in petitioner's brief on the merits (pp. 66-69) where it is shown that the Yard Company took the position that the rates and charges in its published tariffs gave it the right to collect such charges from the line-haul carriers and from no one else.

INSERTION OF EXTRA 25 CENTS PER CAR IN FREIGHT-BILLS OF LINE-HAUL CARRIERS GAVE NO RIGHT TO COLLECT IT.

If the Yard Company had no right under its published tariffs to directly collect the controversial 25 cents per car from consignees, it is obvious that the insertion in the freight bills of the line-haul carriers of the controversial 25 cents per car could not justify the collection. If, then, the Yard Company may be said to have collected the controversial 25 cents per car from the shipper, it did so without any authority in its own tariff and without any authority in the published tariffs of the line-haul carriers. On the other hand, if it be said that the line-haul carriers collected the controversial 25 cents per car from the consignee, there was nothing in their published tariffs which justified its collection. The sole and only color of authority to collect the controversial 25 cents per car was the arbitrary insertion of such charge in the freight bills of the line-haul carriers. Each and every item in a freight bill must be authorized by an appropriate published tariff. The items of a freight bill must strictly correspond with the rates and charges contained in published tariffs applicable to the shipment.

Counsel for respondent, Director General, attempt to distinguish the law as laid down by this court in *Covington Stock Yards Company* v. *Keith*, 139 U. S. 128, and by the Court of Civil Appeals of Texas in *Panhandle & S. F. Ry. Co.* v. *Phillips*, 197 S. W. 1031, and *Panhandle & S. F. Ry.*

Co. v. *Crawford*, 198 S. W. 1079, by saying that in those cases the Stock Yard Company there involved was not a common carrier. There is no merit in this attempted distinction because applying the rule laid down by this court in *United States* v. *Union Stock Yards & Transit Co.*, 226 U. S. 286, the Yard Company in all of the three cases above mentioned was necessarily a common carrier. The contention of opposing counsel is premised on the fundamental error that when the live stock reached the end of the line-haul carrier's rails its duty and obligation with reference to the shipment was at an end. This contention purposely or otherwise obscures the uncontradicted fact that the established line-haul rates to Union Stock Yards, Illinois, plus the $2.00 per car terminal charge covered the entire expense to the shipper including unloading. It seems absurd to say that the duty and obligation of the line-haul carriers ended when the live stock reached the end of their lines notwithstanding the fact that in both the $2.00 per car terminal charge and in the through line-haul rate to Union Stock Yards, Illinois, there was included compensation to the line-haul carriers on account of the loading and unloading service.

V.

THE INCREASED CHARGE OF 25 CENTS PER CAR WAS EXACTED FROM YOUR PETITIONERS IN THIS CASE AS THE RESULT OF AN UNLAWFUL PRACTICE IN WHICH BOTH THE LINE-HAUL CARRIERS AND THE YARD COMPANY WERE JOINT PARTICIPANTS; IT WAS WHOLLY IMMATERIAL WHICH OF THEM IN THE FIRST INSTANCE PHYSICALLY COLLECTED THE CHARGE, OR, IN THE LAST ANALYSIS, WHICH OF THEM RETAINED IT.

In this connection opposing counsel distort and misrepresent to this court the allegations in petitioners' petition filed in the District Court. On page 72 counsel for respondent, Director General, say:

> "In their petition (R. 13), petitioners expressly allege
>
> > 'that the shippers and receivers of live stock, including plaintiffs, were compelled to and did pay the defendant, the Union Stock Yards and Transit Company * * * an amount in excess of the former tariff charge, etc.' ".

By the use of asterisks opposing counsel seek to give the impression that petitioners admitted that the Yard Company collected the increased charge of 25 cents per car from the shipper. Supplying the words omitted in the averment quoted, the averment reads as follows:

> "shippers and receivers of live stock, including plaintiffs, were compelled to and did pay the defendant, the Union Stock Yards and Transit Company *and the railroad companies hereinabove referred to* * * * an amount in excess of the former tariff charge for each car of live stock unloaded or loaded by the Union Stock Yard and Transit Company".

That opposing counsel knew full well that the allegation in petitioners' petition referred to the exaction of the charge

by the Yard Company *and the line-haul carriers* jointly, is shown by the sentence following the garbled quotation:

> "It is true the Director General is included with the Yard Company in such allegation."

To sustain the premise made in this portion of their argument that the Commission found that the increased charge of 25 cents per car was collected from the shipper by the Yard Company, opposing counsel refer (R. 123) to the first report of the Commission without frankly stating to the court that the first finding of the Commission was reversed and discarded by the Commission upon further hearing in the second and effective report wherein the line-haul carriers and the Yard Company were jointly and severally found to be liable on account of the practice resorted to by them to exact the controversial 25 cents per car from petitioners in this case.

YARD COMPANY COLLECTED EXTRA 25 CENTS PER CAR AS AGENT FOR LINE-HAUL CARRIERS ON THE AUTHORITY OF THE FREIGHT-BILLS GIVEN TO IT FOR COLLECTION BY LINE-HAUL CARRIERS.

Counsel for respondent Director General, on page 73, seek to justify what was done by respondents to settle the controversy between themselves by the arrangement made to include the controversial 25 cents per car in the line-haul carrier's freight bills against the commission men by attempting to show that the extra 25 cents per car was the charge of the Yard Company and that the Yard Company alone exacted the same from petitioners; that therefore it alone could be held liable to make reparation. This contention obscures the uncontradicted fact in this case that the Yard Company absolutely refused to collect the extra 25 cents per car from the consignees named in the shipments in question under the authority of its own tariffs, and that it was only after the line-haul carriers had agreed

that the extra 25 cents per car should be added to *their* freight bills that the Yard Company agreed to collect the same, *not as a charge of its own, but as a charge of the line-haul carriers.*

Throughout the controversy and in the settlement thereof the Yard Company took the position that, in collecting the controversial 25 cents per car, it was doing so entirely on the authority of the freight bills of the line-haul carriers, and that in making such collection it was acting as agent of the line-haul carriers exactly the same as when it collected the other charges in the freight bill. (See Excerpts from Original Exhibits 83-84.)

RESPONDENT ADMITS THAT YARD COMPANY IN COLLECTING ALL ITEMS OF FREIGHT-BILLS, EXCEPT THE EXTRA 25 CENTS PER CAR, WAS ACTING AS AGENT FOR LINE-HAUL CARRIERS.

The strange and incongruous position which counsel for respondents are compelled to take on this phase of the case is that as to all charges contained in the freight bills of the line-haul carriers they admit (Brief 53) that the Yard Company in collecting the same was acting as the agent of the line-haul carriers, but as to the collection of the extra 25 cents per car it was acting wholly for itself!

VI.

WHILE IN GENERAL THE MAKING AND COLLECTING OF A SEPARATE CHARGE FOR A TERMINAL SERVICE IN ADDITION TO THE LINE-HAUL RATES IS PROPER AND LAWFUL, THE MAKING AND COLLECTING OF A SEPARATE CHARGE FROM THE SHIPPER ON THE AUTHORITY OF THE PUBLISHED TARIFFS OF THE YARD COMPANY FOR A SERVICE WHICH WAS ALREADY COVERED BY THE ESTABLISHED LINE-HAUL RATES TO UNION STOCK YARDS, ILL., PLUS $2.00 PER CAR TERMINAL CHARGE, WAS BOTH UNREASONABLE AND UNLAWFUL. THE FINDING OF THE COMMISSION THAT THE PRACTICE RESORTED TO BY THE LINE-HAUL CARRIERS AND THE YARD COMPANY WAS AN UNREASONABLE AND UNLAWFUL PRACTICE, BEING INSEPARABLY CONNECTED WITH THE DETERMINATION OF FACTS BY THE COMMISSION, SHOULD BE ACCEPTED BY THIS COURT.

Under this subdivision counsel for respondent Director General again attempt to befog the real question of substance in this case by seeking to make it appear that the finding of the Commission that

> "the collection of separate charges from the shippers for unloading or loading in addition to the rates on live stock from and to interstate points to and from the Stock Yards was an unlawful and unreasonable practice,"

was based on the purely legal question as to whether or not it was unlawful to set up the charges for the loading and unloading service separately from the line-haul rates. We have heretofore, on pp. 24 to 28, *supra*, shown the fallacy of this contention.

STATEMENT OF QUESTION INVOLVED BEFORE THE COMMISSION.

The Commission having found that it was the duty of the line-haul carriers to unload live stock consigned to Union Stock Yards, Ill., as an integral part of the transportation service, and having held that the line-haul rates to Union Stock Yards, Ill., plus the $2.00 per car terminal charge, constituted the through rate to Union Stock Yards, Ill., including the unloading service, the question before the Commission was: WHERE A LINE-HAUL CARRIER IN ITS PUBLISHED TARIFFS HOLDS ITSELF OUT TO THE PUBLIC TO TRANSPORT LIVE STOCK TO THE UNION STOCK YARDS, ILL., FOR A THROUGH RATE OR CHARGE, WHICH INCLUDES THE UNLOADING OF SUCH LIVE STOCK, IS THE SETTING UP OF A SEPARATE CHARGE FOR THE UNLOADING SERVICE IN THE PUBLISHED TARIFFS OF AN AGENCY WHICH PERFORMS THE UNLOADING SERVICE FOR THE LINE-HAUL CARRIER AND THE EXACTION FROM THE SHIPPER OF BOTH THE THROUGH RATE OR CHARGE OF THE LINE-HAUL CARRIER AND THE SEPARATE ADDITIONAL CHARGE IN THE PUBLISHED TARIFFS OF SUCH AGENT, AN UNLAWFUL PRACTICE?

The Commission properly held such practice both unreasonable and unlawful and properly held the extra 25 cents per car to be an unlawful charge (R. 151).

RIGHT OF LINE-HAUL CARRIERS TO SET UP IN PUBLISHED TARIFFS A SEPARATE CHARGE FOR LOADING AND UNLOADING NOT INVOLVED.

In attempting to obscure the real question of substance involved by making it appear that the practice condemned by the Commission was merely that of setting up in the combined tariffs of the line-haul carriers and the Yard Company a charge for the loading and unloading service separately from the charge of the line-haul carriers, counsel quote from paragraph 1 of Section 6 of the Act to Regulate

Commerce, (49 U. S. C. A., Section 6, paragraph 1, pages 240-241) which provides:

> "The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried and shall contain the classification of freight in force, *and shall also state separately all terminal charges*, storage charges, icing charges and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise shall affect or determine any part or the aggregate of such aforesaid rates, fares and charges or the value of the service rendered to the passenger, shipper or consignee." (Italics theirs.)

It is manifest that the portion of paragraph 1 of Section 6 quoted refers to the contents of the separate schedules of a single carrier. It does not refer to the combined schedules of two or more common carriers. Obviously, also, said paragraph does not warrant a single particular item of service connected with the transportation of property to be controlled in part by the schedules of one common carrier and in part by the schedules of another common carrier. As applied to the schedules of a single common carrier, it undoubtedly authorizes and requires such common carrier to state separately in such schedules all terminal charges in addition to the commodity or line-haul rates in such schedules. But by no process of reasoning can it be construed to mean that a given common carrier may in its schedules set up through line-haul rates and a terminal charge which together cover compensation for such terminal service, and at the same time allow another common carrier to set up in its published tariffs a charge for the identical terminal service and justify the imposition of the charges of both common carriers against the shipper. This question was not involved in *Interstate Commerce Commission* v. *C. B. & Q. R. R. Co.*, 186 U. S. 320, or in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98.

Counsel for Director General quote from the opinion of this court in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, for the purpose of justifying the setting up in the schedules of two common carriers charges covering the same item of service. Manifestly, that case does not announce any such rule. In that case the Commission specifically found that the $2.00 per car terminal charge was just and reasonable. The Commission condemned the $2.00 per car terminal charge, notwithstanding it had already held said charge to be just and reasonable, on the ground that when the terminal charge and the line-haul rates were added together they together, in the aggregate, were unreasonable and unjust. That situation is not analogous to the situation here presented.

In the *Stickney* case it is said:

> "For services that it (meaning the carrier) may render, *or procure to be rendered*, off its own line or outside the mere matter of transportation over its line, it may charge and receive compensation."

We agree entirely with this statement of the law, but, as we have heretofore pointed out, that is not the question here. If the complaint in this case had been that the charges of the Yard Company in its published tariffs, added to the charges contained in the published tariffs of the line-haul carriers, were in the aggregate unreasonable and unjust, and the Commission had found that the charges of the Yard Company were properly assessable against the shipper, and that such charges in and of themselves were just and reasonable, *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, would apply; but in the instant case such questions were not involved, because the holding of the Commission that it was the duty of the line-haul carriers to load and unload live stock at Union Stock Yards, Ill., as a necessary and integral part of the transportation of such live stock to that station, and that the line-haul rates to Chicago plus a charge of $2.00 for terminal or switching service con-

stituted the through charge and included delivery of live stock to the consignee at the Stock Yards, made it wholly unnecessary for the Commission to consider the reasonableness either of the line-haul rates plus the $2.00 per car terminal charge in the published tariffs of the line-haul carriers, or the reasonableness of the loading and unloading charges in the published tariffs of the Yard Company.

We agree with the statement of counsel for respondent Director General (p. 80):

> "Where the terminal charges and the line-haul charges are stated separately, if the aggregate is unreasonable, the reduction must be in the factor making up the through rate which is unreasonable. Neither factor can be determined to be unreasonable unless evidence is produced supporting such conclusion."

The fallacy of the entire argument of counsel for respondent Director General on this phase of the case is clearly shown by the following mis-statement of fact on page 75 of their brief:

> "The entire charge for transporting the live stock from point of origin to destination in the Yards is made up of the line-haul rate and of the Yard Company's charge for its common carrier service."

and by their erroneous statement on page 81, where they liken the services and charges of the line-haul carriers and of the Yard Company to the distinct and separate services and charges of connecting carriers dealing in their published tariffs with different portions or items of an entire transportation transaction. If the line-haul carriers and the Yard Company in this case had severally performed separate and distinct parts in the aggregate service involved in the transportation of live stock, and each in its published tariffs had confined its rates and charges to the particular portion of the services respectively performed by each, then there would have been a basis for the statement of opposing counsel that "each tariff is for the serv-

ices performed and the facilities furnished by the carrier filing the tariff; the tariff of neither covers any part of the service of the other." The above quotation from the brief of Director General demonstrates the false premise upon which opposing counsel have built their case.

VII.

THE YARD COMPANY IN PERFORMING THE LOADING AND UNLOADING SERVICE AT ALL TIMES SINCE ITS CREATION ACTED AS THE AGENT OR INSTRUMENTALITY OF THE LINE-HAUL CARRIERS PERFORMING A SERVICE INSEPARABLY CONNECTED WITH THE UNDERTAKING OF THE LINE-HAUL CARRIERS IN THEIR PUBLISHED TARIFFS AND IN ITS PUBLISHED TARIFFS SPECIFICALLY STATED THAT THE RATES AND CHARGES CONTAINED IN ITS PUBLISHED TARIFFS WERE FOR SERVICES WHICH IT PERFORMED AS A CARRIER'S AGENT.

In petitioners' brief on the merits (pp. 65-69) we invite the attention to the various places in the record of the Commission which conclusively show that the Yard Company in performing the loading and unloading service at all times since its creation acted as the agent for the line-haul carriers who directly paid the Yard Company for the performance of that service and that in filing its published tariffs it specifically recognized the capacity in which it performed that service and made the rates and charges in its published tariffs conform to that fact. This is specifically shown by the caption in its published tariffs of May 21, 1917 preceding the enumeration of rates and charges. That caption is as follows (Certified Excerpts from Original Exhibits, p. 13):

> "The charge made by this Company for the service (as a carrier's agent) of loading and unloading live stock at the Union Stock Yards of Chicago is as follows".

Recognizing the vital significance of this language in the published tariffs of the Yard Company and its destructive effect on their contentions, counsel for respondent, Director General, strenuously attempt to destroy the effect of the words "as a carrier's agent" as contained in the published tariffs of the Yard Company, first by attempting to persuade the court that such language must be rejected as surplusage, and then attempting to show that the Yard Company had no authority from the line-haul carriers to file its tariffs in such a manner as to restrict the application of its rates and charges to the line-haul carriers.

THE WORDS "AS A CARRIER'S AGENT" MUST BE REGARDED AND GIVEN THEIR INTENDED EFFECT.

It is obvious that the words "as a carrier's agent" were inserted for the purpose of restricting and limiting the application of such rates and charges to the line-haul carriers for a service which the Yard Company performed for the line-haul carriers as their agent. The language of the published tariffs of the Yard Company in this respect must be construed in the light of the facts which were not controverted before the Commission, viz., that the Union Stock Yard & Transit Company was organized by the line-haul carriers entering Chicago for the purpose of performing for the line-haul carriers terminal services involved in the shipment of live stock to Chicago, including the loading and unloading service; that continuously for more than 50 years the Stock Yard Company performed such terminal service for and on behalf of the line-haul carriers and were paid directly by the line-haul carriers for the performance of that service. The close unity of operation between the line-haul carriers and the Yard Company, as outlined in petitioners' brief on the merits (pp. 9-12), conclusively establishes that in the performing of the loading and unloading service, and the various other services enumerated at pages

9 to 12 of petitioners' brief on the merits, the Yard Company was acting as the agent and instrumentality of the line-haul carriers.

Obviously, the object and purpose of inserting the words "as a carrier's agent" in the published tariffs of the Yard Company was not to convey the meaning that the Yard Company was publishing the tariff as and for a tariff of the line-haul carriers, nor to indicate that it had authority of the line-haul carriers to file such tariff. The words "as a carrier's agent" explain, limit, and define the words, "the charge made by this company for the service of loading and unloading live stock at Union Stock Yards, Chicago"; thus explained, it is apparent that the words "as a carrier's agent" parenthetically inserted in the published tariffs of the Yard Company were deliberately inserted to prevent a construction that such charges were to be assessed against the shipper in addition to the through line-haul rates plus the $2 per car terminal charge in the published tariffs of the line-haul carriers.

No Denial or Repudiation of Claim of Yard Company That It Performed Loading and Unloading Service as Agent for Line-Haul Carriers Until After Suit Was Brought.

On page 82 of brief of respondent, Director General, it is stated that when the Yard Company filed its tariff stating that the rates and charges therein contained were for services which it rendered as a carrier's agent, the line-haul carriers immediately protested against the idea that the Yard Company was their agent in filing the tariff or in performing its common carrier service. On page 84, in referring to the words "as a carrier's agent" in the published tariffs of the Yard Company, they say:

"The line-haul carrries did not permit such misstatement to go unchallenged but at once repudiated

> the same and long before Federal control shippers knew of such repudiation."

These statements are without the slightest support in the record. There was no such repudiation and no such protest.

But if there had been the situation would have been exactly the same. This court has repeatedly held that a carrier must strictly observe, enforce and comply with not only the rates and charges set forth in its published tariffs, but every provision, restriction and limitation contained in the tariffs. (*Davis* v. *Henderson,* 266 U. S. 92-93). Obviously, neither the terms and provisions of published tariffs, nor the legal effect of the same, can be changed by protests or repudiations.

Counsel for respondent, Director General, irrelevantly say on page 84 of their brief:

> "If the shippers were damaged by the misstatement their remedy, if any, would be against the party committing the wrong. They were not, however, damaged or affected by such misstatement in respect to any shipment in controversy. They knew of the misstatement long before any shipment in controversy was made."

Such argument either shows a desperate attempt to obscure the question of substance involved or a lack of understanding of the force and effect of published tariffs.

Counsel for respondent on page 84 in referring to the words "as a carrier's agent" as used in the published tariffs of the Yard Company say:

> "Such language did not authorize shippers to understand the charge was imposed upon the line-haul carriers".

This statement is strangely inconsistent with the attempt of counsel for respondent to influence the court by the repeated unwarranted statement that the line-haul carriers protested against the representation of the Yard Company in its published tariffs that it was acting as a carrier's

agent, and repudiated the representation. If such language did not warrant shippers to understand that the charge was imposed upon the line-haul carriers, why the reason for alleged protest and repudiation on the part of the line-haul carriers?

MEANING OF TARIFFS OF YARD COMPANY FRANKLY STATED BEFORE COMMISSION.

Furthermore, as we have pointed out in petitioners' brief on the merits (pp. 68-69), one of the eminent counsel here representing the Yard Company, in referring to the phraseology of the published tariffs of the Yard Company, among other things, said (Certified Excerpts from Original Exhibits, p. 56):

> "I say that the plain phraseology of the tariff shows that we proposed to increase the charge for the service we rendered to those for whom we have always rendered it, to-wit: carriers whose agents we are, and not to any shipper in the United States."

ANSWER FILED BY YARD COMPANY IN DISTRICT COURT ALLEGES AGENCY.

As we also pointed out in petitioners' brief on the merits (p. 64), the answer of the Yard Company filed in the District Court in the instant case specifically sets up that during the times referred to in the petition it was acting as the agent of the railroads or line-haul carriers hauling said shipments into and out of said yards (R. 28-29.)

A NEW IDEA AS TO MEANING OF WORDS "AS A CARRIERS AGENT" IN TARIFFS OF YARD COMPANY.

In this connection counsel for respondent say, on pages 84 and 85 of their brief:

> "The inference to be drawn from such language, had it not been challenged, was that the charge was

being imposed on the shipper by the Yard Company acting as agent of the line-haul carriers, *i. e.*, the tariff was really a tariff of the line-haul carriers published by the Yard Company as their agent."

It is difficult to reconcile this new idea of the meaning of the language of the published tariffs of the Yard Company with the previous strenuous argument of opposing counsel (page 84 of their brief), in which they say that the words "as a carrier's agent" meant nothing and should be rejected as surplusage. It is also difficult to reconcile this new idea of the meaning of the language of the published tariffs of the Yard Company with the uncontradicted fact that the Yard Company itself at all times insisted that the "plain phraseology of the tariff" shows that the increase in charges in such tariff was intended to be assessed against the line-haul carrier and not against the shippers (Certified Excerpts from Original Exhibits, pp. 57-58, R. 22-23).

RULE GOVERNING JOINT RATES NOT INVOLVED IN THIS CASE.

Counsel for respondent Director General urge that the line-haul carriers could not be bound by the published tariffs of the Yard Company, because it did not file with the Commission evidence of concurrence therein or acceptance thereof, as provided in Section 6, paragraph 4, of the Act to Regulate Commerce (49 U. S. C. A., Section 6, paragraph 4, page 281). Section 6 referred to applies to the joint tariff of several carriers each performing services separate and distinct from the other.

As we pointed out in petitioners' brief on the merits (pp. 61-62), this case is not one to which the rules with reference to joint rates apply. The shipper had nothing whatever to do with the question of whether the line-haul carriers concurred in the published tariffs of the Yard Company, or whether the Yard Company concurred in the published tariffs of the line-haul carriers, and had no interest

in that matter. Those matters were wholly between the line-haul carriers and the Yard Company. The question, however, of the right of the line-haul carriers and the Yard Company, or either of them, to exact the extra 25 cents per car from the shipper, was dependent upon the plain language of the published tariffs on file and not on the question of concurrence and acceptance, as provided for in Section 6, paragraph 4, of the Act to Regulate Commerce.

We agree with the statement of opposing counsel, on page 86 of their brief, where, in referring to the Yard Company after it had filed its tariffs of May 21, 1917, increasing its previous charges, they state:

> "Its status as a common carrier had not changed in the meantime. Its relations with the line-haul carriers had not changed in the meantime. Its relations with the shippers had not changed."

THE WORDS "AS A CARRIER'S AGENT" IN TARIFFS OF YARD COMPANY WERE DELIBERATELY USED FOR A CERTAIN DEFINITE PURPOSE AND CANNOT BE REJECTED AS SURPLUSAGE.

In this connection, counsel for respondent, referring to the statement in the published tariffs of the Yard Company of May 21, 1917, to the effect that the charges therein contained were for its services "as a carrier's agent", say that this was a "mis-statement"; that the limiting effect of the language of such tariffs "was unauthorized by law, unauthorized by the Commission, and unauthorized by the line-haul carriers, and became and was mere surplusage." The irrelevant question of whether the statement in the published tariffs of the Yard Company, was authorized by the Commission or authorized by the line-haul carriers, must not be allowed to obscure the real question of substance in this case as to whether or not, under the existing published tariffs of the Yard Company and the line-haul carriers on file during the period in question, the

exaction of the extra 25 cents per car from the commission men, petitioners in this case, was lawfully justified.

Attempt To Shift Entire Blame On Yard Company Futile.

Lastly, under this subdivision, counsel for respondent Director General seek to shift the onus of the practice condemned by the Commission to the Yard Company by saying:

> "The consequences must rest on the Yard Company, who attempted the unauthorized thing, and not on the line-haul carriers, who neither participated therein nor profited thereby."

This attempt to shift responsibility obscures the proposition that the adoption of a practice by which there is exacted from the shipper an unlawful or unjustifiable charge is a tort, which renders all who participate in such practice jointly and severally liable to make reparation; that in such tort action the court will not weigh the degree to which each of the participants in such practice participate.

Counsel for respondent Director General frankly concede in their brief (p. 89) that the line-haul carriers did participate in the exaction of the extra 25 cents per car from the commission men by adding that amount to their freight bills, which were afterwards collected by the Yard Company. This alone was sufficient to constitute the line-haul carriers joint tort feasors in the transaction.

VIII.

THE ARGUMENT OF RESPONDENT THAT CONGRESS DID NOT CONSENT THAT THE AGENT APPOINTED BY THE PRESIDENT MIGHT BE PROCEEDED AGAINST BEFORE THE INTERSTATE COMMERCE COMMISSION FOR A TORT, BUT ONLY FOR DAMAGE RESULTING FROM THE COLLECTION OR ENFORCEMENT BY OR THROUGH THE PRESIDENT DURING THE PERIOD OF FEDERAL CONTROL OF RATES, FARES, CHARGES, CLASSIFICATIONS, REGULATIONS AND PRACTICES, STATES AN ANOMALOUS POSITION.

This court has repeatedly held that the exaction from the shipper of an unreasonable or unlawful charge is, of itself, a tort. It would therefore seem that since "the collection or enforcement of rates, fares, charges, classifications, regulations, or practices which are unjust, unreasonable, unjustly discriminatory or unduly or unreasonably prejudicial," in and of itself constitutes a tort, the argument of respondent that Section 206-A of the Transportation Act of 1920 did not constitute consent on the part of Congress that the agent appointed by the President might be proceeded against before the Interstate Commerce Commission for a tort, is anomalous.

It is apparent that counsel for respondent under this subdivision seek to make it appear that the proceedings for reparation before the Commission and this suit is against the Director General as an agency or arm of the Federal Government. This is not correct. The proceedings before the Commission and the suit in question were against the line-haul carriers operating under Federal control and not against the Government. While the Director General was a necessary party because of the provisions of the Federal Control Act, the proceedings before the Commission and the suit here in question were to all intents and purposes

against the line-haul carriers (*Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554).

While counsel for respondent Director General have quoted Section 206-A of the Transportation Act of 1920 (49 U. S. C. A. Section 74, Page 357), they omit to call the attention of the court to Section 10 of the Federal Control Act, Chapter 25, 40 Stat. 451, 456, 457, which in part provides:

> "SECTION 10. That carriers, while under Federal Control, shall be subject to all laws and liabilities as common carriers whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other act applicable to such Federal Control or any order of the President. Actions at law or suits in equity may be brought by or against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

The argument of counsel for respondent under this subdivision is completely refuted by this court in *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554, where this court, speaking through Mr. Justice Brandeis, says on page 559, in referring to the provisions of Section 10 of the Federal Control Act:

> "The Government was to operate the carriers, *but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers* . . . Operation was to be continued as theretofore with the old personnel, subject to change by executive order. *The courts were to go on entertaining suits and entering judgments under existing law*, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control." (Italics ours.)

Respondent Distorts Plain Meaning of Language of Commission's Orders.

Counsel for respondent, Director General, next distort the plain language and meaning of the orders entered by the Commission in the instant case by seeking to make it appear that in said orders the real purpose of the Commission was to require the Director General to absorb the increase in the Yard Company's charges, and that the wrong for which the Director General was held liable was his refusal to absorb the increase and that it was not the intent of Congress to vest in the Interstate Commerce Commission authority, to grant reparation on account of such failure on the part of the Director General to absorb the increase. In the first place if the premise of this argument was correct it would make no difference under Section 10 of the Federal Control Act and Sec. 206A of the Transportation Act. Furthermore, there is nothing in the order of the Commission which condemns the Director General for any failure to absorb the increase. On the contrary, the orders of the Commission carefully refrain from passing upon or determining any question whatever affecting the respective rights of the Director General and the Yard Company with reference to such absorption. The Commission in refusing to consider this phase of the case (R. 145) says:

> "The apprehensions of the line-haul carriers that the Stock Yards Company may make any charge it pleases which they will be required to pay are not well founded upon their complaint or upon the complaint of any party. We can examine any of the charges that make up the sum of the through charges and may prescribe just and reasonable rates for all carriers concerned, either by prescribing through routes and joint rates and divisions thereof, or otherwise, as the facts may warrant".

On page 88 counsel for respondent, Director General, say:

> "The Director General did not question a rate at all; did not establish the rate complained of. He merely refused to increase an absorption. The Yard Company established the rate, collected it, and retained it as compensation for the service which it rendered".

Again, we point out that this statement obscures the fact that had it not been for the active cooperation and affirmative acts of the line-haul carriers in adding the controversial 25 cents per car to their freight bills and through the agency or instrumentality of the Stock Yard Company collecting the same from petitioners, this case would never have arisen.

To substantiate the contention that the Commission found that the Yard Company collected and retained such charges from the shipper, counsel for Director General refer to the report of the Commission of February 11, 1919, (R. 123) without frankly stating to the court the fact that the language quoted was contained in a report afterwards reversed and disregarded by the Commission upon further hearing.

On page 89 of their brief counsel for Director General attempt to minimize the part which the line-haul carriers took in the unlawful exaction from petitioners of the controversial 25 cents per car by naively stating:

> "No complaint is made of the freight charge, and we must therefore assume that the putting of the additional 25 cent charge for unloading on the bill and the collecting of it constitutes the alleged joint tort. In that sense, the Director General assisted in the collection by the Yard Company, but such assistance is not an act for which the Commission was given jurisdiction to impose a liability on the Director General."

The record shows that the Director General not only assisted in this manner, but that the entire

freight charges, including the controversial 25 cents per car, were turned over by the Yard Company and the total amount received as operating revenue for the line-haul carriers. This is plainly shown by the testimony of H. W. Beyers, the principal witness for the line-haul carriers before the Commission, who, in referring to the practice resorted to by the line-haul carriers and the Yard Company to settle their controversy with reference to the controversial 25 cents per car, testified; (Certified Excerpts from Original Exhibits, p. 40):

> "We (meaning the line-haul carriers) got up to the point where we reached an understanding with your company (meaning the Yard Company), that made it possible for us to conserve our revenue and not have you withhold the 25 cents."

Mr. Beyers further testified (Certified Excerpts from Original Exhibits, p. 41):

> "Mr. Shaw: On the contrary, rather than go to the trouble of collecting your bills, you preferred to plus your bills 25 cents and still give them to us for collection, did you not?
>
> Mr. Beyers: Well, it was an amicable adjustment of differences that existed at that time.
>
> Mr. Shaw: That is what you did?
>
> Mr. Beyers: Yes, sir."

IX.

THE ABSORPTION TARIFFS OF THE LINE-HAUL CARRIERS DID NOT FURNISH THE MEASURE OF THEIR OBLIGATION WITH REFERENCE TO THE LOADING AND UNLOADING SERVICE.

We have heretofore discussed, in petitioners' brief on the merits (pp. 51 to 59), our contentions with reference to the force and effect of said absorption clause under the particular facts and circumstances in this case. It is unnecessary here to repeat what we there said. We will

confine our discussion of this subdivision of the brief of respondent Director General to pointing out the incorrect and misleading statements therein made.

On page 91 counsel for respondent says:

> "The line-haul carriers filed their tariffs fixing their rates for transportation, which limited the transportation to the carrier's own line with delivery to a connecting carrier if destined beyond the line of the originating carrier."

As we have heretofore pointed out, the Union Stock Yards, Ill., was specifically named as a terminal station in the published tariffs of the line-haul carriers, and through rates and charges, plus a $2.00 per car terminal charge, were provided in such tariffs for the through transportation of live stock to the Union Stock Yards, Ill., including the unloading. In the establishment of such through rates and charges, and in said published tariffs, the Union Stock Yards, Ill., was treated exactly as if it had been situated at the end of the tracks actually owned by the line-haul carriers, and in such published tariffs the facilities of the Chicago Junction Railroad and of the Union Stock Yard & Transit Company were treated exactly the same as if they had been absolutely owned and operated by the line-haul carriers. The record conclusively shows that the Chicago Junction Railroad operated no engines or cars or other instrumentalities of transportation. It merely owned the tracks upon which the line-haul carriers, in delivering live stock to the Union Stock Yards, operated their own trains, cars and other equipment with their own crews. The payment by the line-haul carriers to the Chicago Junction Railroad of a trackage charge made the tracks and facilities of the Chicago Junction Railroad, to all intents and purposes, the tracks and facilities of the line-haul carriers.

The same is true with reference to the facilities of the Yard Company. It made no difference to the shipper, so far as the application of the rates and charges in the published tariffs of the line-haul carriers were concerned, whether the line-haul carriers actually owned or operated the Stock Yards, or whether they employed an agency to perform for them a transportation duty which they owed to the shipper.

This court will take judicial notice that in practice many of the incidental terminal services connected with the through transportation of property are performed by agencies or instrumentalities selected by the carrier to enable the carrier to carry out its contract of shipment with the shipper.

EVEN IF ABSORPTION CLAUSE LIMITED PAYMENT TO YARD COMPANY OF SPECIFIC NUMBER OF CENTS THEREIN MENTIONED, THIS CANNOT EXCUSE THE EXACTION OF THE EXTRA 25 CENTS PER CAR FROM PETITIONERS.

In this connection it is urged by counsel for the Director General that the line-haul carriers were prevented by the absorption clause in their published tariffs from paying the Yard Company anything in excess of that provided in said absorption clause; that to have done so would have been in violation of the Act. It is useless for opposing counsel to thus attempt to confuse the issue here involved. What amount should have been paid by the line-haul carriers to the Yard Company for the performance of the loading and unloading service was entirely a matter between the line-haul carriers and the Yard Company. True, the Yard Company was as a common carrier legally bound to publish its tariffs covering the services it performed and the rates and charges for such services but the filing

of such tariffs did not change the actuality with reference to the nature of the services performed or the capacity in which they were performed. If the line-haul carriers deemed the increase of 25 cents per car excessive, its remedy was to have applied to the Commission to settle that question. On such application it would have been determined what compensation the Yard Company was entitled to receive for its services and what amount, if any, of such charges the line-haul carriers should absorb. But respondents chose to expedite the settlement of their controversy by resorting to the practice condemned by the Commission with the result that the controversial 25 cents per car was exacted from the commission men. The record shows without the slightest contradiction that the line-haul carriers had for more than 50 years made the matter of the expense for the loading and unloading of live stock at the Union Stock Yards, Illinois, a matter solely between themselves and the Yard Company, and made their rates and charges sufficiently high to reimburse themselves for the charges which they paid to the Yard Company. Under such circumstances it was entirely inconsistent with the spirit and intent of the Act to Regulate Commerce for the line-haul carriers to unite with the Yard Company in an evasion of the law by adding to their freight bills, which they knew would be collected from the shipper, the controversial 25 cents per car, and passing on to the shipper the burden of their controversy with the Yard Company. The line-haul carriers in adding the additional 25 cents per car to their freight bills deliberately assumed the responsibility for all of the consequences in so doing.

FREIGHT-BILLS COLLECTED WERE NOT COMPOSITE BILLS, BUT IF THEY WERE IT WOULD MAKE NO DIFFERENCE.

These freight bills were not, as counsel for respondent seek to make it appear, a composite bill showing, respectively, the charges of the line-haul carriers and of the Yard Company. On the contrary, the freight bills purported to represent only charges of the line-haul carriers charged against the commission men. The record shows that the Yard Company had its own separate bill against the commission men for feed and yardage. The fact that in some instances the freight bills stated that the additional 25 cents per car was added because of increase in charges of the Yard Company did not make the extra charge of 25 cents per car any less a charge of the line-haul carriers than any other charges therein contained. All charges, including the extra 25 cents per car, in the freight bills purported to be the line-haul carriers' charges against the consignees named in the shipments involved. But if said freight bills may be said to have been composite bills, what difference can that make in this case? The exaction of the extra 25 cents per car, without lawful authority contained in published tariffs, was unlawful under the particular facts and circumstances in this case, regardless of the construction which may be given such freight bills.

Under this subdivision counsel for respondent Director General again insist that the line-haul carriers, in paying the charges of the Yard Company, were obliged to abide by their tariff provisions and could not increase their absorptions without amending their tariffs. As we have heretofore pointed out, this contention seeks to obscure the real question involved, viz.: *Was the exaction of the extra 25 cents per car from the commission men justified?*

X.

THE CONTENTION OF RESPONDENT DIRECTOR GENERAL THAT PETITIONERS HAD NO RIGHT TO MAINTAIN THIS ACTION HAS BEEN ANTICIPATED AND ANSWERED IN PETITIONERS' BRIEF ON THE MERITS, PAGES 75 TO 96.

Nothing new has been presented on this question in the brief of respondent Director General. In the main we are content to rest the decision of this case on the very able brief filed in this cause on behalf of the Interstate Commerce Commission as *amicus curiae* and on what we have already stated, at pages 75 to 96, of petitioners' brief on the merits. Counsel for the Director General, after devoting 33 pages of their brief in an effort to show that petitioners had no right to maintain this action, strenuously insist that the question is not involved. If the point made by respondents that petitioners had no right to maintain this suit was well taken, it would be decisive of the entire case.

It would seem that if the point upon which the District Court disposed of this case still remains in the case, so that it may be made the basis for affirming the judgment of the Circuit Court of Appeals, it is in the case for any and all purposes.

There are two minor matters in this subdivision of respondent's brief to which we desire to call the attention of this Honorable Court. On page 120 they say:

> "Throughout a good portion of that brief it is assumed that the plaintiffs were awarded reparation 'as factors', but as we have shown, this is not a fact. The plaintiffs were awarded reparation in their own right, and, therefore, a discussion of their right to maintain this suit in the representative capacity as factors is not in issue."

Here again counsel for respondent mis-state the facts.

The complaint filed in No. 12614 (R. 149) specifically states that the 103 plaintiffs in this case are entitled to reparation "as factors and agents on behalf of the owners, consignors and consignees of the shipments to and from the stock yards out of which said contested loading and unloading charges arose." The Commission in its report of June 2, 1925, after making findings showing the relationship between the shipper and the commission men and establishing the right of the latter to enforce reparation in their representative capacity as factors (R. 151), specifically mentions the 103 plaintiffs in this case and finds that they "are severally entitled to reparation as factors and agents for the shippers" (R. 151-152).

ALL ORDERS OF COMMISSION ENTERED IN THIS CASE MUST BE CONSIDERED AND CONSTRUED AS A WHOLE.

It has been repeatedly held by this court that where there are several reports and orders of the Commission with reference to a given matter, such reports and orders must be considered and read together as a whole and so interpreted. (*Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 620, 624.)

The order of December 12, 1927, expressly refers to the report of the Commission entered on February 11, 1919, and the report of the Commission entered on July 15, 1920, and the report of the Commission entered on June 2, 1925, (R. 157) and then states "which reports are hereby referred to and made a part hereof." (R. 158).

Referring to the order of June 2, 1925, (R. 147 to 156) we find the identical complainants mentioned and described in the order of December 12, 1927, named and enumerated in the order of June 2, 1925, and mentioned as being the persons entitled to reparation. The names of the plaintiffs

in this case there enumerated are preceded by the following finding (R. 151):

> "We find the following individuals, copartners, and corporations, parties of record, made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to reparation, *as factors and agents for the shippers*, with interest from date of payment."

Construing together as one continuous and complete report all of the reports of the Commission hereinabove referred to and considering the language of said orders in the light of what was actually done by the parties with reference thereto, it is idle and useless to argue that it was the intent and purpose of the order of December 12, 1927, to grant reparation to the complainants in their individual rights for their individual use and benefit. The Commission having in its order of June 2, 1925, found that the plaintiffs, naming them, were entitled to reparation *as factors and agents for the shippers*, it was unnecessary for the Commission in its subsequent order of December 12, 1927, naming the identical plaintiffs which it named in its previous order, to repeat the words "as factors and agents for the shippers." It must necessarily be assumed that the Commission intended to grant reparation to the plaintiffs in the order of December 12, 1927, in exactly the same capacity as that expressly stated in its previous order of June 2, 1925.

But it is said by counsel for the Director General that the petition filed in the District Court to enforce the award of the Commission did not expressly state that it was brought by plaintiffs in their representative capacity. In answer to this we state:

First: That if plaintiffs had the right to maintain the

suit as consignees named in the transportation transaction, then it was not necessary to state in the petition filed in the District Court that they brought said suit in their representative capacity for the use and benefit of the shippers, even though, as a matter of fact, they were so doing.

Second: If they had a right to maintain said suit in the District Court either as factors or as trustees of an express trust, it was not necessary to state that they, in fact, were bringing said suit for the use and benefit of the shippers.

Third: If they had the right to bring this suit in their representative capacity, the petition filed, considered as a whole, shows that the plaintiffs in the District Court were seeking to enforce a right which had been conferred upon them by the Interstate Commerce Commission in their representative capacity, and the petition may therefore be properly construed as being a suit brought by the plaintiffs in their representative capacity for the use and benefit of those for whose benefit the award of the Commission was procured without *expressly* stating that it was brought by them in a representative capacity, since that fact appeared for fair intendment in the petition.

Fourth: The contention urged is highly technical and contrary to the objects and purposes of the Act to Regulate Commerce.

Explanation Made Necessary by Misleading Statements of Respondent.

In the statement contained in the brief or respondent Director General, on pages 14 and 15, it is said, in referring to Docket No. 9977:

> "The Yard Company and Live Stock Exchange filed petitions for rehearing and on April 14, 1919, the proceeding was reopened and in the order so doing the Director General of Railroads was named as a respondent. (R. 237-238)."

Counsel for respondent make no point of this in their argument, but the effect of the statement is to mislead. The record shows (R. 149) that all charges which remain unpaid and which are here involved are covered by complaint in Docket No. 12614. It is therefore wholly immaterial that the Director General of Railroads was named as respondent in No. 9977. Furthermore, it was wholly immaterial whether the Director General was made a party to the complaint in No. 9977, or whether any amendment was ever made so as to make the Director General a party to No. 9977. As a matter of fact he was made a party to Docket No. 9977. (R. 148.)

AWARD OF COMMISSION COVERS SIMILAR CHARGES WHICH HAVE BEEN PAID AND THEREFORE ARE NOT INVOLVED IN THIS CASE.

In this connection an explanation may be pertinent with reference to the shipments and charges covered by the award of December 12, 1927 (R. 157 to 208) and an explanation of the portion of the order of the Commission of June 2, 1925 where (R. 150) claims of Armour & Company and fourteen other Chicago packers are referred to and reparation awarded to them.

The original aggregate amount of the items of reparation covered by the order of the Commission, involved items not included in the sum of $140,001.25, *now remaining unpaid and here involved.* It included in addition thereto reparation in favor of petitioners and against the line-haul carrie individually for the period of time immediately prior to the period of Federal Control. Payment by the line-haul carriers to the plaintiffs of the items in said reparation order arising prior to the period of Federal Control eliminated those items from the amount sought to be recovered by plaintiffs in the District Court.

In the proceedings before the Commission Armour & Company, Wilson & Company, Morris & Company, Swift & Company, and eleven other Chicago packing companies presented their several claims for reparation growing out of the exaction of the disputed charge, not only during the period of Federal Control, but during the period of time immediately antecedent to that period. The Commission in said proceeding granted reparation to said packers (R. 150), who were paid by the Director General and the Stock Yard Company the amount of the reparation awarded to them on account of the collection of the disputed charge during the period of Federal Control. The Chicago packers were also paid by the line-haul carriers as reparation for the payment of the additional 25 cents per car, paid by the packers during the time immediately preceding the period of Federal Control, the full amount of such payments. This accounts for the circumstance that although the Chicago packers were parties to the proceedings before the Interstate Commerce Commission, and there sought and obtained an order of reparation on account of the payment by them of the disputed charges in question, they were not co-plaintiffs with the petitioners in this case in the suit brought in the District Court. It is also in explanation of the statement made by counsel for respondent Union Stock Yard & Transit Company, on page 14 of their brief where it explained that the amounts in said order of reparation (R. 157 to 208), not preceded by the initial "D. G.", are not involved in this suit.

XI.

THE WRIT IN THIS CASE WAS NOT IMPROVIDENTLY GRANTED.

We do not dispute the well established proposition that if this court on hearing the case on its merits concludes that the writ of certiorari by which the case was brought before it was improvidently granted the writ may be dismissed, but this is not such a case.

Regardless of what counsel for respondent have said under this subdivision of their brief, we still insist:

1. That there is squarely raised by the decision of the Circuit Court of Appeals an important question of Federal law which has not been, and should be, settled by this Honorable Court, viz: Where a carrier holds itself out in its published tariffs to transport live stock under through rates and charges for the complete transportation, including the unloading of such live stock, may an extra charge for a part of the unloading service be exacted from the shipper, either by the carrier or its agent, on the basis of a tariff published and filed by the agent of the line-haul carrier increasing its charge for such unloading service, without the line-haul carrier first amending its published tariff of rates and charges purporting to cover the entire service?

2. That there is squarely raised by the decision of the Circuit Court of Appeals the further question which has not been and which should be settled by this Honorable Court, viz: May a common carrier engaged solely in the rendering of a terminal service to another line-haul carrier as its agent, lawfully file its tariffs of rates and charges as to make the same applicable only to the carrier for whom it is performing such service as agent?

3. That there is squarely raised by the decision of the

Circuit Court of Appeals the further question which has not been and which should be settled by this Honorable Court, viz: Does an absorption clause in the published tariffs of the line-haul carriers, to the effect that it will absorb and pay a certain portion of a terminal charge, such as the unloading of live stock, control and prevail over other portions of such published tariffs which undertake the performance of the entire transportation transaction including such unloading in consideration of the payment by the shipper of a fixed commodity charge plus a fixed terminal charge?

4. That the action of the Circuit Court of Appeals in ignoring in its decision the finding of the Commission that "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for years constituted the through charge and included delivery of live stock to the consignee at the stock yards" (R. 144), and in substituting its judgment for that of the Commission in holding that the classifications of the line-haul carriers were controlling over the line-haul rates and said $2.00 terminal charge, was a clear departure from the accepted and usual course of judicial proceedings and from the rule well established by this court to the effect that where tariffs filed require consideration of matters of fact and application of expert knowledge for the ascertainment of the technical meaning of the rules and a correct appreciation of a variety of incidents affecting their use, the determination of the meaning of such tariffs calls for the exercise of the trained judgment of that body of experts appointed by law and informed by experience, namely, the Interstate Commerce Commission; that in such case the courts will respect and accept the finding of the Interstate Commerce Commission as to the meaning, force and effect of such tariffs. (*Standard Oil Co.* v. *United States*, 283 U. S. 235; *Illinois Central R. R.* v. *Interstate Commerce Commission*, 206 U. S. 441, at

454; *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285.)

5. That the action of the Circuit Court of Appeals in refusing to respect and accept the finding of fact by the Interstate Commerce Commission that it was the duty of the carriers to unload live stock consigned over the lines of the line-haul carriers to the Union Stock Yards at Chicago, and in substituting its judgment for that of the Commission on that subject, and holding (R. 397-398) that it was the duty of the shipper to unload his own live stock at the Union Stock Yards, or to directly pay respondent Union Stock Yard & Transit Company for performing such service a charge in addition to the amount set up in the line-haul rates and in the $2.00 terminal charge of the line-haul carriers covering said service, was a departure from the accepted and usual procedure of the courts in this kind of a case and directly contrary to the views expressed by this court in *United States* v. *Union Stock Yards*, 226 U. S. 286, *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, *Interstate Commerce Commission* v. *Union Pacific R. R. Co.* 222 U. S. 541, and *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441.

6. (a) That the action of the Circuit Court of Appeals in affirming the judgment of the District Court has sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings in a case of this kind; by the affirmation of the judgment of the District Court the published opinion in that case has the effect of law and precedent.

(b) That the rule so announced by the District Court and sanctioned by the Circuit Court of Appeals is also directly contrary to the decisions of other District Courts, namely *Arcadia Mills* v. *Carolina C. & O. Ry.*, 293 Fed. 639; *Merchants & Manufacturers Traffic Ass'n* v. *United States*, 231

Fed. 292; *Consolidated Cut Stone Co.* v. *Atchison, T. & S. F. Ry. Co.*, 39 Fed. (2d) 661.

Conclusion.

We again respectfully submit that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit and the judgment of the District Court be reversed and the cause remanded to the District Court with such directions as this court may deem appropriate.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,
Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,
Respondents.

PETITIONERS' REPLY TO BRIEF OF RESPONDENT UNION STOCK YARD & TRANSIT COMPANY ON THE MERITS.

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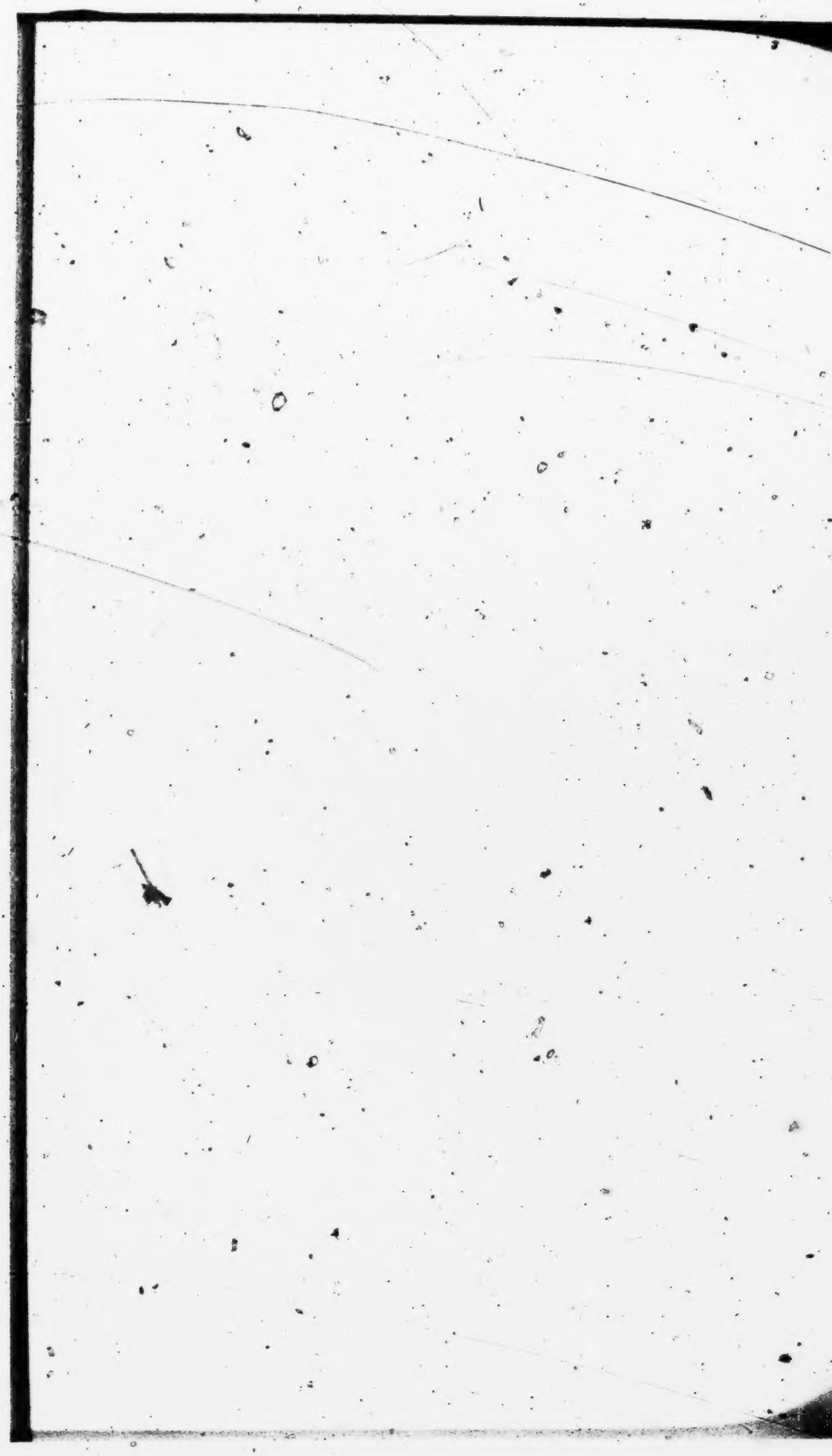

INDEX.

		PAGE
Statement		1
Summary of Argument		3
Argument:		
Point I	—The *prima facie* effect of the order of the Commission was not rebutted either by evidence submitted to the Commission or by evidence submitted to the court	7
Point II	—We admit the appeal is from the judgment of the lower courts and not from their opinions	8
Point III	—The vice of the practice condemned by the Commission was not the unreasonableness of the amount of the charges in and of themselves in the tariffs of the line-haul carriers and of the Yard Company, but the practice resorted to compelled the shipper to pay an extra charge for the loading and unloading service when that service was already covered by the charges in the published tariffs of the line-haul carriers	9
Point IV	—This court cannot consider and weigh the evidence before the Commission, as respondent seeks to persuade it to do	23
Point V	—The right of petitioners to maintain reparation proceedings before the Interstate Commerce Commission and to maintain the suit in the instant case in the District Court is established by the brief filed by the Interstate Commerce Commission as *amicus curiae* and by subdivisions VII A and B of petitioners' brief on the merits, pages 75 to 96	26

Point VI—This point is not properly before this court as it was not raised in the trial court or noticed either by the District Court or by the Circuit Court of Appeals. The contention made that the orders of reparation involved included charges growing out of intrastate shipments is not sustained by the facts in the case. Even if the award improperly included items growing out of purely intrastate shipments, this would only affect such particular items. The Commission had authority, under the Federal Control Act and by Section 206-A of the Transportation Act, to enter the orders in question..... 29

Point VII—This point was not raised in the trial court or noticed either in the District Court or in the Circuit Court of Appeals. Furthermore, there is no basis in fact for the contention.. 37

Point VIII—The contention that the Commission did not have before it any competent evidence upon which the amount of reparation could be determined is not in accordance with the facts and is refuted by the record of the Interstate Commerce Commission. There was competent evidence introduced, ample to support the award of reparation. The method adopted of proving the multitude of charges involved was in accordance with the recognized modern rule with reference to proof of voluminous accounts, books and records, and approved by this Court in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117..... 41

Point IX—The contention that the award of reparation here involved is void because the Commission in making it considered evidence not properly introduced in evidence before it, is not in accordance with the truth in that regard 49

Cases Cited.

Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U. S. 370 13
Armstrong v. Belding Bros., 296 Fed. 728, certiorari denied in 265 U. S. 585 46
B. & O. S. W. Co. v. Brubaker, 217 Ill. 462 45
Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426 35
Davis v. Keystone Steel & Wire Co., 317 Ill. 278 35
Grand Pass Shooting Club v. Crosby, 181 Ill. 266 45
Interstate Commerce Commission v. Baird, 194 U. S. 25 47
Interstate Commerce Commission v. C. B. & Q. R. R., 186 U. S. 320 15
Interstate Commerce Commission v. Stickney, 215 U. S. 98 .. 14
Lewis-Simas-Jones v. Southern Pacific Co., 283 U. S. 654 40
Meeker v. Lehigh Valley Ry. Co., 236 U. S. 412 8
Mellon v. World Publishing Co., 20 Fed. (2d) 613 33
Missouri, K. & T. R. R. Co. v. Elliott, 102 Fed. 96, affirmed in 184 U. S. 695 46
Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554 34
Morrill v. Jones, 106 U. S. 466 29
Nash v. Classen, 163 Ill. 409 45
People v. Small, 319 Ill. 437 46
Reinke v. Sanitary District of Chicago, 260 Ill. 380 47
Southern Pacific Co. v. Darnell-Taenzer Co., 245 U. S. 531 ..26, 33
Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117 .....6, 47
Virtue v. Creamery Package Co., 227 U. S. 8, at pp. 38-39 ... 29
Walker v. Sauvinet, 92 U. S. 90 29
Wyman v. City of Chicago, 254 Ill. 202 45

STATUTES CITED.

Act to Regulate Commerce:
Sec. 1 (6) (U. S. C. A. Title 49, Sec. 1 to 15a, p. 79) 14
Sec. 6 (3) 18
Sec. 15 (U. S. C. A. Title 49, Sec. 1 to 15a, p. 426) 15
Sec. 16 31
Federal Control Act:
Sec. 10 14
Transportation Act:
Sec. 74 (c) 33
Sec. 206-A 4, 5
Wigmore on Evidence, Vol. 3, (2d Ed.) Sec. 1530 47

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581.

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,

Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,

Respondents.

PETITIONERS' REPLY TO BRIEF OF RESPONDENT UNION STOCK YARD & TRANSIT COMPANY ON THE MERITS.

STATEMENT.

MAY IT PLEASE THE COURT:

The statement in the brief of respondent Union Stock Yard & Transit Company is substantially correct. There are, however, a number of statements therein contained which are not correct or are only partially correct and therefore misleading. Inasmuch as the same incorrect or misleading statements are made in the argument, in order to save repetition we will call the attention of the court to such incorrect or misleading statements in our reply to the various subdivisions of respondent's brief.

ARGUMENT.

PREFACE.

In some respects the points and contentions made by counsel for respondent Union Stock Yard & Transit Company coincide with the points and contentions made by respondent Director General. In other important respects the contentions of respondent Union Stock Yard & Transit Company are radically different.

It is to be observed:

1. That respondent Union Stock Yard & Transit Company makes no contention that the so-called classifications in the published tariffs of the line-haul carriers applied to shipments of stock consigned to Union Stock Yards, Ill., or that the so-called absorption clause in the published tariffs of the line-haul carriers constituted the limit and extent of the obligation of the line-haul carriers with reference to the unloading service.

2. That respondent Union Stock Yard & Transit Company makes no claim that in performing the loading and unloading service it was not acting as the agent for the line-haul carriers.

3. That respondent Union Stock Yard & Transit Company makes no claim that in stating that the charges contained in its published tariffs were "as a carrier's agent" it did not intend to restrict the application of such charges to the line-haul carriers.

4. That respondent Union Stock Yard & Transit Company denies that it collected from the shipper and retained the controversial 25 cents per car.

5. That respondent Union Stock Yard & Transit Company does not deny the correctness of the finding of the Commission that the stock yards were the terminals of the line-haul carriers.

SUMMARY OF ARGUMENT.

I.

While we admit the law to be that an order of the Commission to be sustained by the courts must be supported by evidence and must not be contrary to the law, and that the *prima facie* effect of an order of the Commission may be overcome either by the evidence submitted to the Commission or by evidence submitted to the court, we contend that the orders of the Commission involved in this case were not so rebutted.

II.

We admit that the appeal herein is from the judgment of the lower courts and not from their opinions.

III.

While the Yard Company as a common carrier was obligated to file with the Commission its tariffs containing its charges for the loading and unloading of live stock, it was not required or authorized to collect said charges or to join with the line-haul carriers in collecting the same from the shipper against whom the charges in said tariffs were not directed. The vice of the practice condemned by the Commission was not the unreasonableness of the amount of such charges, but that the practice resorted to by respondents in effect compelled the shipper to pay an extra charge for the loading and unloading service when that service and the charges therefor were legally covered by the published tariffs of the line-haul carriers then on file.

IV.

This court cannot consider and weigh the evidence before the Commission to ascertain whether the weight of the evidence supports the finding of the Commission that under the particular facts and circumstances in this case it was the duty of the line-haul carriers to load and unload live stock at Union Stock Yards, Ill. Under this subdivision respondent seeks to persuade the court so to do.

V.

The various phases of the question with reference to the right of petitioners to maintain the reparation proceedings before the Interstate Commerce Commission and to maintain the suit in the instant case in the District Court have already been covered by the able and exhaustive brief filed by the Interstate Commerce Commission as *amicus curiae* and by subdivisions VII A and B of petitioners' brief on the merits, pages 75 to 96.

VI.

The contention made that the orders of reparation involved in this case were invalid because they included charges growing out of intrastate shipments is not sustained either by the facts or by the law in the case. If the award of reparation had included items growing out of purely intrastate shipments, this would only affect such particular items. The burden of proof to show that there were such items included in the award was on respondent. By the Federal Control Act, a war measure, and by Section 206-A of the Transportation Act, the Commission was given full jurisdiction to grant reparation on account of un-

lawful or unreasonable charges exacted on purely intrastate shipments during the period of Federal Control. Nor is this point now properly before this court, inasmuch as it was not raised in the District Court or noticed either by the District Court or by the Circuit Court of Appeals.

VII.

The contention that the Commission was without jurisdiction to award reparation against the Yard Company in Docket No. 9977, and that therefore the order of the Commission of December 12, 1927, is void as against the Yard Company, is untenable and based on hypercritical and farfetched conclusions. There is no basis of fact in the record to sustain any such contention, nor was this point raised in the District Court or noticed in either the District Court or the Circuit Court of Appeals.

VIII.

The contention that the Commission did not have before it any competent evidence upon which it could determine the amount of reparation awarded by it is untenable and clearly refuted by the record of the Interstate Commerce Commission admitted in evidence in the District Court. This point is so devoid of merit that counsel for respondent Director General do not even mention it in their brief. The argument of counsel for respondent Yard Company on this phase of the case is based upon a misconstruction of the facts in the case. The evidence introduced was ample to support the award of reparation. If any erroneous item of charges was included in the proof made by petitioners in the proceedings before the Interstate Commerce Commission, it was incumbent upon respondents, who had in their possession complete records of all of the shipments

involved, to have pointed out such error to the Commission. The method adopted in this case of proving the multitude of charges involved was in accordance with the recognized modern rule with reference to proof of voluminous accounts, books and records. The method adopted was also in accordance with the method of proof adopted in the case of *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, and there approved by this court.

IX.

The contention that the award of reparation here involved is void because the Commission in making it considered evidence not properly introduced in evidence before it, is not in accordance with the truth in that regard. The basis of the contention is a misunderstanding or misinterpretation of what actually took place before the Commission.

ARGUMENT.

I.

WE ADMIT THE LAW TO BE THAT AN ORDER OF THE COMMISSION TO BE SUSTAINED BY THE COURTS MUST BE SUPPORTED BY EVIDENCE AND MUST NOT BE CONTRARY TO LAW; FURTHER, THAT THE PRIMA FACIE EFFECT OF AN ORDER OF THE COMMISSION MAY BE REBUTTED EITHER BY THE EVIDENCE SUBMITTED TO THE COMMISSION OR BY EVIDENCE SUBMITTED TO THE COURT.

We agree with counsel for the respondent Yard Company that the fact that the Commission has made an order in this case does not mean that the proceedings in the trial court should have differed in any way from the accepted methods of trying any other suit therein, or that the trial judge should have adopted a different attitude toward petitioners than toward other litigants. We admit further that it was open to respondents in the District Court to contest the propriety of the order by showing that there was no competent evidence before the Commission upon which to base the order, or by showing that the Commission exceeded its power in making it. We contend, however, that if there was competent evidence before the Commission upon which the order of the Commission might be justified, the court is without power to weigh the evidence introduced before the Commission for the purpose of arriving at a conclusion differing from that of the Commission.

We admit, subject to the rule that the orders of the Commission in the instant case must be considered by the court as prima facie correct, that petitioners were in the same position as any other plaintiffs seeking a recovery and subject to the same obligations. We admit further the rule as

laid down in *Meeker* v. *Lehigh Valley Railway Company*, 236 U. S. 412, to the effect that the provision of Section 16 of the Act to Regulate Commerce, making prima facie correct the orders of the Commission, establishes a rebuttable presumption and cuts off no defense and interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury.

Our contention is that there was ample competent evidence before the Commission upon which to base the order of reparation in this case, and that the prima facie effect of that order was not overcome by any evidence offered in the District Court.

II.

WE ADMIT THAT THE APPEAL HEREIN IS FROM THE JUDGMENT OF THE LOWER COURTS AND NOT FROM THEIR OPINIONS.

While we admit that this court has the right, in a proper case, to affirm the judgment of the lower court on grounds not mentioned in its opinion, we contend that the raising by counsel for respondents of other grounds not mentioned in the opinion is an indication of the lack of faith in the correctness of the grounds upon which the lower court based its judgment.

It is our contention that a judgment of the lower court is in legal contemplation and adjudication of the rights of the parties based upon the particular facts in the case; that it is the effect of the judgment of the lower court as applied to the particular facts in the case which is involved on appeal. We have discussed this proposition in subdivision X of reply to brief of Director-General p. 68.

III.

THE YARD COMPANY, IF A COMMON CARRIER, WAS OBLIGATED TO FILE WITH THE COMMISSION ITS TARIFFS CONTAINING ITS CHARGES FOR LOADING AND UNLOADING OF LIVE-STOCK, BUT IT WAS NOT REQUIRED OR AUTHORIZED TO COLLECT SAID CHARGES OR TO JOIN WITH THE LINE-HAUL CARRIERS IN COLLECTING SAID CHARGES FROM THE SHIPPER AGAINST WHOM THE CHARGES IN SAID TARIFFS WERE NOT DIRECTED. THE REASONABLENESS OF THOSE CHARGES, SO FAR AS THE AMOUNT THEREOF WAS CONCERNED, WAS NOT CONDEMNED BY THE COMMISSION BECAUSE THAT QUESTION WAS NOT INVOLVED.

Under this subdivision counsel for the respondent Yard Company remind the court that it consistently maintained in the proceedings before the Commission that it was not a common carrier. Manifestly, if this contention is correct, the including of the controversial 25 cents per car in the freight bills of the line-haul carriers was wholly without tariff authority, and therefore the Director General of Railroads must, in any and all events, be held liable, regardless of the liability of the Yard Company. Manifestly, also, if that position was correct, the Yard Company, in performing the loading and unloading service, necessarily acted as the agent for the line-haul carriers.

Under this subdivision counsel for the respondent Yard Company seek to shift the onus and responsibility for its part in the practice resorted to by respondents to exact from the shipper the charges in controversy by asserting:

> "The Commission in its Investigation and Suspension Docket 1118, declined to permit the Yard Company to discontinue the publication of its tariff containing its increased charges of 50 cents and 75 cents for unloading and loading live stock, and affirmatively required the Yard Company to continue the filing with it of that tariff."

This statement is extremely misleading. It infers that the Commission required the Yard Company to continue in force and effect its new tariffs of May 21, 1917. The record shows that the Yard Company never made any attempt to change or amend the charges in its published tariffs of May 21, 1917. The Yard Company, on September 1, 1917, made application to the Commission not only to withdraw its tariffs of May 21, 1917, *but to withdraw all of its published tariffs, inseparably coupled with a request to the Commission to approve its proposed plan of making the entire subject of loading and unloading a matter of private operating arrangement between the Stock Yard Company and the line-haul carriers* (R. 250-251). Simultaneously with the filing of said application the Yard Company notified each of the line-haul carriers that the attempt on the part of the Yard Company to cover the use of its facilities by tariff instead of placing the same on an operating basis was then and always had been a mistake (R. 251; Certified Excerpts from Original Exhibits, pp. 5, 6).

YARDS COMPANY WAS NOT REQUIRED BY COMMISSION TO KEEP IN EFFECT ITS INCREASED TARIFFS.

The statement made by counsel for the respondent Yard Company, on page 30 of their brief, to the effect that during the entire reparation period covered by the petition herein the Yard Company was obligated, under the Commission's decision, to collect its charges of 50 cents per car for unloading and 75 cents per car for loading live stock, is based on the misleading inference given concerning the action of the Commission. The record conclusively shows that the Yard Company could, at any time after the filing of its tariff of May 21, 1917, have withdrawn the same and substituted its former tariff charges of 25 cents per car for unloading and 50 cents per car for loading.

Clearly, in any event, the Yard Company was not obligated to collect the controversial 25 cents per car from the shipper, against whom its tariff as worded was not directed.

REASONABLENESS OF SEPARATE CHARGES NOT INVOLVED.

We have heretofore in our reply to the brief of respondent Director General shown that the issue of the reasonableness in amount of the charges of the Yard Company and of the charges of the line-haul carriers was not involved; that the holding of the Commission that the practice resorted to by respondents to exact from the shipper the controversial 25 cents per car was unlawful and unreasonable because of the grounds assigned in the order of the Commission (R. 144-145), it was wholly unnecessary for the Commission to consider the question of whether the charges of respondents, considered in and by themselves, were unreasonable or excessive in amount. However, while not vital or controlling in this case, the Commission did specifically find that the separate 25 cents per car was an unlawful charge (R. 151). The reason, however, for so holding was not from the standpoint of the amount of the combined charges of respondents, but because, under the published tariffs of the line-haul carriers then on file, the shipper was legally entitled to a full and complete transportation of his live stock to Union Stock Yards, Ill., including the unloading, and therefore the extra 25 cents per car set up in the separate published tariffs of the agent or instrumentality through which the line-haul carriers performed the unloading service was an unlawful charge.

The statement of counsel for respondent, on page 31 of their brief, that the first complaint of the Chicago Live Stock Exchange asked that the line-haul carriers be required to absorb the increased charges of the Yard Company, and that said complaint alleged that with the 25 cent

increase in the Yard Company's charges added to the line-haul rates, those rates were unreasonable.

If true, this would not change the situation, because that complaint also charged that the practice resorted to by the line-haul carriers and the Yard Company to collect the controversial 25 cents per car from the shippers was an unlawful and unreasonable practice. But the statement of counsel for respondent is not true. Both the complaint in No. 9977 and the complaint in No. 12614 clearly stated that the handling of the 25 cent increase in the Yard Company's charges was a matter wholly between respondents, in which complainants had no interest (R. 254). Furthermore, in neither the prayer of the complaint in No. 9977 (R. 256) nor in the prayer of the complaint in No. 12614 (R. 266) do the complainants ask that the line-haul carriers be required to absorb the increased charges of the Yard Company. But if they had, it could make no difference. When the evidence before the Commission clearly showed that such practice was unlawful under the facts and circumstances in the case, the Commission had the right to so declare and to award reparation regardless of any and all other allegations and requests contained in the complaints.

It is argued that because the Commission in its order did not find that the charges of the Yard Company and the charges of the line-haul carriers were unreasonable from the standpoint of the amount thereof, this court must consider that those rates and charges were reasonable. On this premise it is argued with apparent sophistry that the order of the Commission awarding reparation to petitioners in effect required the Director General to reduce his line-haul rates by the amount of the increase in the charges of the Yard Company, or required the Yard Company to refund one-half of the unloading charges collected by it and one-third of the unloading charges collected by it during the reparation period. If this contention is allowed to

prevail, it necessarily follows that no award for reparation in any case can be lawfully awarded by the Commission on either the ground that the charges are unlawful or that the practice resorted to to collect the same was unlawful, without there also being an investigation and finding of the reasonableness of the charge exacted from the standpoint of its amount. Thus a carrier having a charge of $15.00 per car for the transportation of live stock to a certain destination could exact $20.00 per car from the shipper, and unless the shipper showed that $20.00 per car was an unreasonable charge from the standpoint of the amount thereof, an order of the Commission granting reparation would be invalid and void.

YARDS COMPANY NOT LEGALLY REQUIRED TO COLLECT EXTRA CHARGE FROM SHIPPER.

In this connection counsel for respondent, on page 33, say:

> "If the Yard Company was a common carrier, the law required it to collect and retain the entire amount of its loading and unloading charges."

This statement obscures the fact that the tariffs of the Yard Company furnished no justification for the collection of any charges whatever against the shipper, as the present counsel for the Yard Company strenuously and repeatedly asserted before the Commission (Certified Excerpts from Original Exhibits, pp. 56-57-58). It also obscures the proposition that although the law makes the rates contained in the published tariffs of a carrier the legal rates which it in the first instance is bound to collect, nevertheless the law provides a right of reparation to the shipper for unlawful charges exacted from him, irrespective of the fact that in the first instance the line-haul carrier is compelled to collect the full amount of its published charges. (*Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370.)

On page 35 of their brief counsel for respondent Yard Company concede the right of the Commission to condemn an unreasonable practice under Section 1 (6) of the Act to Regulate Commerce, (U. S. C. A. Title 49, Sec. 1 to 15a, p. 79) and Section 10 of the Federal Control Act, but say that in this case "the Commission sought to cloak its action by a finding that the practice of collecting the charges was illegal." This charge is unwarranted. The question here involved was not whether the charges of the Yard Company in and of themselves were unreasonable, or whether the charges in the published tariffs of the line-haul carriers in and of themselves were unreasonable, but whether, in view of the fact that the charges of the Yard Company in its published tariffs purported to be agents' charges against the line-haul carriers and the charges in the published tariffs of the line-haul carriers purported to cover the entire charges against the shipper for the transportation of his live stock, including unloading, the line-haul carriers and the Yard Company could lawfully unite in a practice whereby the shipper was forced to pay the extra 25 cents per car occasioned by the increase in the charges of the Yard Company in its tariffs filed May 21, 1917, for a service already legally included in the through charges of the line-haul carriers in their tariffs then on file.

In this subdivision counsel for respondent the Yard Company say that the situation in the instant case is precisely the same as in *Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98. In our reply to the brief of respondent Director General, at pp. 49-50, we discuss the situation and legal points involved in *Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98, and show that the situation in that case and the questions there involved are entirely different than the question here presented. It is unnecessary to repeat what we there said.

Counsel for respondent the Yard Company also say that the decision in *Interstate Commerce Commission* v. *C. B. & Q. R. R. Co.*, 186 U. S. 320, is in point. We submit, however, that there is no similarity between the situation here involved and that involved in *Interstate Commerce Commission* v. *C. B. & Q. R. R. Co.* In that case the Commission specifically found that the $2.00 per car terminal charge there in question was in itself reasonable. It also found that the through rate, when separately considered, was just and reasonable. In that case the only charges involved were in the separate published tariffs of the line-haul carriers delivering live stock to Union Stock Yards, Ill. The through line-haul rate and the $2.00 terminal charge therein contained were charges of a single carrier contained in its separate published tariffs. They were not, as in this case, charges of two common carriers, each attempting in its published tariffs to deal with and cover by charges the identical service.

It is urged that what the Commission was trying to do in this case was to require the absorption of the charges of the Yard Company by the line-haul carriers. The orders of the Commission disclose no intent on the part of the Commission to require the line-haul carriers to absorb the charges of the Yard Company. It declares the practice resorted to by respondents to exact from the shipper the controversial 25 cents per car unlawful, and holds them jointly and severally liable to make reparation.

We have already in our reply to the brief of respondent Director General answered the suggestion made by counsel for respondent Yard Company, that the inclusion of Sec. 15 of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 1 to 15-A, p. 426) in the Transportation Act of February 29, 1920, indicates that before the enactment of such Act it was not the duty of the line-haul carriers to load and unload live stock at Union Stock Yards, Ill.

(1) THE CHARACTER OF THE CHARGE COLLECTED.

Counsel for respondent facetiously say that there was nothing unlawful or illegal in the increased charges of the Yard Company unless the assertion of counsel makes them so. The increased charges of the Yard Company may or may not have been in and of themselves, *as applied to the line-haul carriers against whom such charges in the published tariffs of the Yard Company were directed,* reasonable, lawful or legal, but the extra charge of 25 cents per car exacted from petitioners without authority of either the published tariffs of the line-haul carriers or the Yard Company was an unlawful charge. This portion of the argument for respondent attempts to center attention on *reasonableness of the charges* of the Yard Company to the exclusion of the fact that the tariffs of the Yard Company did not authorize the collection of said charges from petitioners, and that the charges of the Yard Company were for a service already covered by the published tariffs of the line-haul carriers then on file.

STATEMENT OF FUNDAMENTAL QUESTION INVOLVED.

Opposing counsel say that in the absence of a finding by the Commission that the charges contained in the tariffs of the Yard Company were unreasonable and unlawful, they must be presumed to be reasonable and lawful. Be that as it may, it has no bearing on the question here involved. Try as hard as they may to obscure the real question of substance involved, the question before the Commission WAS: WHERE A LINE-HAUL CARRIER IN ITS PUBLISHED TARIFFS HOLDS ITSELF OUT TO THE PUBLIC TO TRANSPORT LIVE STOCK TO THE UNION STOCK YARDS, ILL., FOR A THROUGH RATE OR CHARGE, WHICH INCLUDES THE UNLOADING OF SUCH LIVE STOCK, IS THE SETTING UP OF A SEPARATE CHARGE FOR THE UNLOADING SERVICE IN THE PUBLISHED TARIFFS OF AN AGENCY OR

INSTRUMENTALITY WHICH PERFORMS THE UNLOADING SERVICE FOR THE LINE-HAUL CARRIER AND THE EXACTION FROM THE SHIPPER OF BOTH THE THROUGH RATE OR CHARGE OF THE LINE-HAUL CARRIER AND THE SEPARATE ADDITIONAL CHARGE IN THE PUBLISHED TARIFFS OF SUCH AGENT OR INSTRUMENTALITY, AN UNLAWFUL PRACTICE?

(2) THE ALLEGED WRONG COMPLAINED OF BY PETITIONERS.

Under this heading it is said that the position taken by petitioners, that the wrong committed by the Yard Company was in conniving with the Director General to collect the charges sued for herein from the shipper when it had knowledge of the shipper's right to a completed transportation service, including unloading, without such payment, is based upon a misunderstanding. Opposing counsel attempt to make it appear that the misunderstanding referred to is the result of the failure of counsel for petitioners to understand that because the line-haul carriers at one time absorbed all of the loading and unloading charges of the Yard Company they assumed a continuing obligation to absorb them at all times, regardless of their amount. There is no misunderstanding on our part as to the provisions of the absorption clause referred to. We have fully presented our views with reference to the force and effect of said absorption clause, on the questions here involved, in petitioners' brief on the merits at pages 44 to 50 and at pages 54 to 59, and also in our reply to the brief of respondent Director General, pages 63 to 66. It is unnecessary to repeat here what we there said.

The attempt to focus the attention of the court on the provisions of the absorption clause is to obscure the vital proposition that the charges in the published tariffs of the Yard Company were restricted to charges made by the Yard Company against the line-haul carriers for its services as their agent in performing the

loading and unloading service, and obscures the admitted fact that before the filing of the increased tariffs by the Yard Company on May 21, 1917, the through line-haul rates to Union Stock Yards, Ill., plus the $2.00 per car terminal charge, covered all of the expense to the shipper connected with the transportation of his live stock to that terminal station, including the unloading thereof, and that no change could lawfully be made in that situation without the line-haul carriers first changing that situation in the manner required by paragraph 3 of Section 6 of the Act to Regulate Commerce.

(3). THE ALLEGED AGENCY OF THE YARD COMPANY.

Under this heading counsel for respondent Yard Company say that we concede that the charges of the Yard Company were legally established. This is apt to be misleading. We concede, of course, the right and obligation of the Yard Company to file tariffs of its rates and charges, and admit that the legal measure of the charges to be collected is in the first instance the amount of such published charges, but we strenuously deny that there was anything in the published tariffs of the Yard Company which made the rates and charges therein contained a legal and lawful charge against the shippers. In this respect our contention is exactly the same as the contention made by the present counsel for respondent Yard Company before the Commission (Certified Excerpts from Original Exhibits, pp. 54-55-56-57-58).

Respondent Silent as to Position Taken Before Commission.

Opposing counsel are strangely silent with reference to the positive and unqualified position taken by them before the Commission as to the clear meaning and intent of the

published tariffs of the Yard Company. In this connection counsel for respondent (p. 42) admit that "the Yard Company did contend before the Commission that in performing the loading and unloading service it was acting as the agent of the line-haul carriers," but that this position was taken in an effort to support its claim then being made that it was not a common carrier. It is obvious that regardless of the particular point in support of which the contention was made, counsel for respondent Yard Company represented that it was an established fact that in performing the loading and unloading service the Yard Company was acting as agent for the line-haul carriers and that the charges in its published tariffs were intended as charges against the line-haul carriers and not against the shippers. If that representation of fact was true then, it is true now. *If it was the truth and fact for one purpose it was the truth and fact for all purposes.* The evidence overwhelmingly shows that the Yard Company in performing the loading and unloading service at all times acted as the agent of the line-haul carriers. In fact, there was no evidence before the Commission to the contrary.

The contention is made that all of the charges contained in both the published tariffs of the Yard Company and of the line-haul carriers were direct charges against the shipment and therefore charges which respondents were compelled to collect. This contention obscures the relationship, in the performance of the loading and unloading service, between the line-haul carriers and the Yard Company, the fact that the charges in the published tariffs of the Yard Company were directed against the line-haul carriers and not against the shipment or the shipper, and the proposition that the line-haul carriers and the Yard Company did not occupy the position of separate and distinct connecting carriers, each performing a separate and distinct portion of the transportation service.

(4) THE ALLEGED DETERMINATION BY THE CIRCUIT COURT OF APPEALS OF THE REASONABLENESS OF THE YARD COMPANY CHARGES.

Counsel for respondent deny that the Circuit Court of Appeals passed on the reasonableness of the Yard Company charges. The opinion of the Circuit Court itself is the criterion on which to determine the question of whether it did or did not attempt to justify the increased charges in the published tariffs of the Yard Company from the standpoint of the justice and reasonableness of such charges. (R. 397-398.)

(5) THE ABSORPTION OF THE YARD COMPANY CHARGES BY THE DIRECTOR GENERAL.

Under this caption counsel for respondent attempt to obscure the plain meaning of the portion of petitioners' brief on the merits (p. 25), where we urge that the question as to whether the line-haul carriers should have absorbed the increased charges of the Yard Company was not involved, by contrasting that position with the argument advanced in petitioners' brief on the merits, (pp. 30 to 51), wherein it is urged that the obligation to pay for the loading and unloading of live stock at the Chicago Stock Yards rested upon the line-haul carriers operating under Federal Control. There is inconsistency in the two contentions. The proceedings in the instant case before the Commission were between the consignees in the various shipments involved, on the one hand, and the line-haul carriers operating under Federal Control and the Yard Company, on the other, and involved the ultimate question as to whether or not the practice by which the extra 25 cents per car was exacted from the shipper was, under the particular facts and circumstances in this case, lawful. The determination of the question as to the duty to load and unload live stock at Union Stock Yards, Ill., was only necessary to show that

such was not the duty of the shipper *under the particular facts and circumstances shown by the evidence in this case.* When the Commission determined that the result of that practice was unlawful, it was unnecessary for the Commission to go further and determine what the line-haul carriers operating under Federal Control should have done in order to protect themselves against a suit for reparation.

What the Line-Haul Carriers Should Have Done.

Obviously, what they should have done before joining in the practice to exact the extra 25 cents from the shipper was to have filed a complaint with the Commission objecting to the reasonableness of the increased charges of the Yard Company or objecting to the restriction of the charges contained in the tariffs of the Yard Company making said charges applicable against the line-haul carriers for services performed by it as their agent. In such proceeding the line-haul carriers and the Yard Company could have threshed out the question as to whether the Yard Company, in performing the loading and unloading service, was acting as the agent of the line-haul carriers or as agent for the shipper, and whether or not the Yard Company could file its tariffs in such manner as to restrict the application of such charges to the line-haul carriers. It is not the fault of petitioners that the Yard Company and the line-haul carriers, operating under Federal Control, settled the controversy between themselves regarding the extra 25 cents per car by uniting in a practice whereby the extra charge was exacted from the shipper without lawful tariff authority.

Respondent Confuses Legal Rates with Lawful Charges.

Counsel for the Yard Company seek to distort the admission made by us (pp. 71 and 72 of Petitioners' Brief on the Merits), that as a matter of law the rates and charges

in the published tariffs of a common carrier are the legal rates which the carrier in the first instance (subject to the obligation to make reparation if such charges are afterwards found to be unlawful or unreasonable) is compelled to collect, into an admission that the Yard Company in this case was compelled to collect its tariff charges from the shipper. Our admission that in the first instance a common carrier is compelled to collect the full amount of its published charges was inseparably connected with the statement that such common carrier *is also compelled by law to observe the provisions of its published tariffs with reference to whom the same should be collected from.*

In this connection, opposing counsel say that petitioners claim that the Yard Company should have collected its charges from the Director General. We made no such contention. Petitioners are not interested in that question. The question in which petitioners are interested is whether under the particular facts and circumstances in this case it was lawful to exact the extra 25 cents from petitioners. Whether the Yard Company should have collected its charges from the Director General is a moot question so far as the issues in this case are concerned.

Frankly, we admit that we cannot conceive what opposing counsel mean by their statement (p. 45 of their brief):

> "Conceding that the Commission did not find any of these charges unreasonable, they (referring to us) cite *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co.*, 52 Sup. Ct. Rep. 183, to prove that in the absence of such a finding, the charges had to be paid, and having been paid could not be recovered."

There is certainly nothing in petitioners' brief which warrants this absurd statement. The unfairness and sophistry employed to place an obviously wrong construction on the meaning of arguments advanced by us would seem to indicate the need of desperate efforts to obscure the real questions of substance involved.

In concluding this subdivision opposing counsel quote and distort the language of petitioners' brief by this remarkable sentence:

> "It results, *to use the words of petitioners' brief*, that the charges 'are proper and will be sustained.'" (Italics ours.)

IV.

UNDER THIS SUBDIVISION RESPONDENT YARD COMPANY SEEKS TO PERSUADE THE COURT TO CONSIDER AND WEIGH THE EVIDENCE BEFORE THE COMMISSION TO ASCERTAIN WHETHER THE WEIGHT OF THE EVIDENCE SUPPORTS THE FINDING OF THE COMMISSION THAT UNDER THE PARTICULAR FACTS AND CIRCUMSTANCES IN THIS CASE IT WAS THE DUTY OF THE LINE-HAUL CARRIERS TO LOAD AND UNLOAD LIVE STOCK AT UNION STOCK YARDS, ILL.

Under this subdivision counsel for respondent frankly confess the inconsistency of the position which they took before the Commission in this case and the position they now take in this court.

Here again counsel for respondent attempt to confuse the action of the Commission in requiring respondents to make reparation jointly and severally on account of the exaction from the shipper of the extra 25 cents per car by the practice resorted to by respondents in this case, with the different question of the right of the Commission to require the Yard Company to reduce its charges for the service rendered. The argument, though ingenious, is not persuasive. In a sense every order of reparation reduces the charges made but this does not mean that the Commission in order to award reparation as to over-lapping charges must also investigate the reasonableness of such charges.

Counsel for respondent Yard Company also seek to make it appear that the Transportation Act, which became

effective February 29, 1920, throws some light on the questions here involved. The same argument is advanced by counsel for respondent Director General. We have heretofore, on pages 30-31 of our reply to the brief of respondent Director General, shown the weakness of this argument.

It is also argued by counsel for respondent Yard Company that the question of the duty to load and unload in this particular case was one of law only. We have heretofore, at page 25 of our reply to the brief of respondent Director General, answered this argument by showing that the determination of this question is inseparably connected with the determination of the purely questions of fact to which we specifically call the attention of this Honorable Court.

It is next irrelevantly contended by counsel for respondent Yard Company that "petitioners were at all times able to secure a free delivery of live stock consigned to them at the yards operated by each of the line-haul carriers and could thus have avoided the payment of the loading and unloading charges of the Yard Company." It would be equally persuasive to argue that a passenger on the New York Central Railroad, who had paid an overcharge for transportation from Chicago to New York, should be denied the right to reparation because he might have avoided the payment of the overcharge by riding on the Pennsylvania. The line-haul carriers in their published tariffs specifically named Union Stock Yards, Ill., as a station to which their line-haul rates, plus $2.00 terminal charge, applied. Under such circumstances it seems absurd to argue that petitioners should be denied reparation in this case because the live stock covered by the shipments in question might have been consigned to yards operated by the line-haul carriers. Furthermore, the evidence before the Commission, introduced after the case had been reopened on rehearing after the first report had been filed,

conclusively shows that the yard facilities of the line-haul carriers in Chicago were entirely inadequate to take care of ordinary shipments of live stock to Chicago. Counsel for respondent, to inject confusion into this question, on page 51 quote from the reversed and discarded first report of the opinion (R. 134).

On page 52 of their brief counsel for respondent Yard Company say that reimbursement to the line-haul carriers for the original 25 cents and 50 cents per car for the unloading service was contained in the $2.00 terminal charge in the published tariffs of the line-haul carriers, and say:

> "The terminal charge would have been larger, however, had the loading and unloading charges of the Yard Company exceeded 25 cents and 50 cents per car. In 1917, when those charges were increased to 50 cents and 75 cents a car, the payment of the increase by the line-haul carriers would have been equivalent to a reduction in their rates."

This observation entirely loses sight of the uncontradicted fact that reimbursement to the line-haul carriers was included, in part, in the $2.00 terminal charge and in the flat through Chicago rate, and that the line-haul rates of the carriers had been, on account of the increased cost of transportation, increased by flat increases of 5 per cent, 15 per cent and 25 per cent, respectively. Obviously, such flat increases, aggregating more than 40 per cent, correspondingly increased the item for the loading and unloading service contained in the established line-haul rates of the cariers as they existed before such increase (Original Exhibit 7, pp. 861-890-891).

Counsel for respondent the Yard Company are also strangely silent with reference to the portion of petitioners' brief on the merits (p. 75), wherein we point out the flat increases in the line-haul rates of the carriers above referred to.

V.

THE QUESTION AS TO THE RIGHT OF PETITIONERS TO MAINTAIN THE REPARATION PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION AND TO MAINTAIN THE SUIT IN THE INSTANT CASE IN THE DISTRICT COURT HAS ALREADY BEEN COVERED BY THE ABLE AND EXHAUSTIVE BRIEF FILED BY THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE AND BY SUBDIVISIONS VII A AND B OF PETITIONERS' BRIEF ON THE MERITS, PAGES 75 TO 96.

We will not repeat what we have heretofore said on this subject at pages 75 to 96 of petitioners' brief on the merits. There are, however, a number of inaccuracies in the statements and deductions of counsel for respondent to which we desire to call attention.

On page 54 of the brief of the respondent Yard Company it is said that it is not contended by petitioners that this suit was not brought by them in their own names and right. This conclusion is not correct. Our contention is that while, as a matter of law, based on the particular facts in this case, petitioners had the right as parties to the transportation transaction from whom the controversial charges were exacted to maintain this suit in their own name under the principles of law laid down in the *Darnell-Taenzer* case, 245 U. S. 531, they were also entitled to maintain this suit as factors or as trustees of an express trust without disclosing the actuality that in instituting said suit they were acting for the use and benefit of the shippers whom they severally represented in the various shipments involved. The petition filed in this case (R. 4 to 18) specifically refers to and makes a part thereof by reference the various orders of the Commission on the basis of which reparation is sought. As we have heretofore observed, such orders and reports of the Commission

must be considered and read together as a whole and so construed. When so construed, it clearly appears, by fair intendment, that plaintiffs were seeking to recover against respondents in the same capacity in which they were awarded reparation by the Commission, viz., as factors or representatives of the owners of live stock whom they severally represented in the various shipments out of which the disputed charges in this case arose. No case has been cited by counsel for either respondent which requires a factor or trustee of an express trust to disclose in his declaration or petition the fact that he is a factor in the transaction or that he is the trustee of an express trust and is in fact bringing the suit for the use and benefit of another. Regardless of what the District Court or the Circuit Court of Appeals may have said on this subject, we maintain that the record in this case shows beyond question that the reparation proceedings before the Commission, and the suit in the District Court, were in truth and in fact brought and maintained by petitioners in this case for the use and benefit of the respective owners of live stock whom they represented in the various shipments out of which the disputed charges in this case arose. The theory on which petitioners or their counsel claimed the right of petitioners to maintain said proceedings before the Commission and in the District Court cannot change the law on the subject. The question of the right of petitioners to maintain this suit must be determined on the basis of the facts appearing in the record in this cause and the law applicable to such facts.

The prayer of the complaint in Docket No. 12614, brought in behalf of petitioners as members of the Chicago Live Stock Exchange, specifically prays (R. 266):

> "that said defendants be required to pay to the individual firms or corporations members of the Chicago Live Stock Exchange as factors and agents for the

use and benefit of the individuals, firms and corporations shown in Appendix A, or directly to said parties shown in Appendix A, by way of reparation for unlawful and unreasonable charges hereinbefore alleged."

By the testimony of dozens of witnesses before the Commission it was established that petitioners in this case were seeking reparation for and on behalf of the shippers whom they respectively represented in the various shipments involved in this case.

The Commission on this subject made the following specific finding of fact (R. 151):

> "There is a direct and well-established relation between the complaining members of the exchange and their shippers by which the former are fully authorized to present these claims and seek awards of reparation in their own names as factors and agents for such shippers. The commission merchant at the stock yards not only disposes of the shipper's stock at the market and at such price as he deems best, but is his agent in the payment of freight and related charges, such as feeding, etc., and in the filing of claims for overcharge and for loss and damage to the stock in transit."

The District Court should have accepted this finding.

The cases cited by counsel for the respondent Yard Company on page 58 of their brief, are all cases in equity. This is an action in tort, arising out of the exaction of unlawful charges through an unreasonable and unlawful practice. The rule applied in equity cases, that a suit must be brought in the name of the real party in interest, except in cases involving a trustee of an express trust, has never been applied by this court in a tort action involving the exaction of unlawful or unreasonable rates and charges.

On page 84 of brief for respondent Yard Company it is said:

> "Petitioners deny any obligation to turn any recovery over to their alleged principals."

This statement is wholly untrue. Throughout the entire proceedings before the Commission and in the courts petitioners have consistently and strenuously insisted that the shippers whom they severally represented in the various shipments out of which the charges in dispute arose will receive the full benefit of any recovery which may be had in this case.

VI.

THE CONTENTION MADE THAT THE ORDER OF REPARATION INVOLVED IN THIS CASE WAS WHOLLY INVALID BECAUSE IT INCLUDED CHARGES GROWING OUT OF INTRASTATE SHIPMENTS IS NOT SUSTAINED EITHER BY THE FACTS OR BY THE LAW IN THE CASE.

This is a new point which was not presented or in any manner brought to the attention of the Commission and which was not presented or brought to the attention of the District Court. In the motion filed in the District Court by respondent Yard Company, to instruct the jury to find the issues in favor of said respondent (R. 52 to 54), the various grounds upon which said motion was predicated were specifically set forth. The ground now urged in this court, that the order of reparation included charges growing out of intrastate shipments, is not one of said points, nor does the answer filed by respondent Yard Company (R. 21 to 29) contain any allegation or predicate any defense on any such ground. The rule is well established that a court of review will not notice a point which was not raised in the court below. (*Virtue* v. *Creamery Package Co.*, 227 U. S. 8, at pp. 38-39; *Morrill* v. *Jones*, 106 U. S. 466; *Walker* v. *Sauvinet*, 92 U. S. 90.)

It is sought to invalidate the order of reparation as a whole by an argument that the award may have included charges collected on purely intrastate shipments. This

argument, if it were not too late to raise it now, is untenable:

1. Because, if true, it could only affect the particular charges growing out of purely intrastate shipments, and could furnish no basis for the action of the District Court in entirely absolving both respondents from all liability.

2. Because, under the facts and the law in this case, the Commission had the right to hold respondents jointly and severally liable to make reparation on account of all items included in the award of reparation.

1. EVEN IF THE COMMISSION IMPROPERLY INCLUDED IN ITS AWARD OF REPARATION ITEMS OF CHARGES GROWING OUT OF PURELY INTRASTATE SHIPMENTS, THE AWARD WOULD ONLY BE AFFECTED TO THE EXTENT OF SUCH PARTICULAR CHARGES.

Even if we were to assume that the Interstate Commerce Commission had no jurisdiction to grant reparation against the Yard Company for charges growing out of purely intrastate shipments, would the mere fact that the award contained particular items of reparation based on shipments arising out of purely intrastate traffic during Federal Control invalidate the entire order? Manifestly not. The award of the Commission is by law made *prima facie* proof of the validity of the order and the validity of the proceedings of the Interstate Commerce Commission leading up to it. If the position of counsel for the Yard Company is correct, an award covering 600,000 or more separate items may be entirely invalidated by showing that one or two of the total items were based on shipments which were purely intrastate in character. Take, for example, in this case, Exhibit 1-A, consisting of many thousands of pages which is brought before this court as an original exhibit in a large box, giving detailed information as to each and every shipment involved in this case and showing that in many of the shipments the total repara-

tion sought is 25 cents. Suppose ten of these 25 cent items were on account of purely intrastate shipments. Ten of such shipments would involve a total of $2.50. Is it possible that any court would be impressed with the argument that the award as a whole amounting to approximately $140,000.00, is to be declared null and void and of no effect merely because of the erroneous inclusion of ten shipments involving reparations to the extent of $2.50? Would it not be more in accordance with judicial decisions, with justice and common sense to hold the order invalid only to the extent of the unauthorized items? If this were not true, the statute which makes the award *prima facie* correct would loose much of its intended force and effect.

We maintain that by force of Section 16 of the Act to Regulate Commerce, the award of the Commission make each and every item of the award prima facie correct; that in law each item is separate and distinct from the others so that the invalidity of one item will not affect the prima facie effect of the order as to other items.

The line-haul carriers and the Yard Company necessarily had records on the basis of which it could be shown whether any of the shipments included in Exhibit 1-A were purely intrastate shipments. The information given in Exhibit 1-A contained detailed information in regard to each and every shipment involved, including the car number, waybill, date of delivery, originating station, name of consignor, name of consignee, and the particular railroad company over whose lines the shipment passed (R. 283). Exhibit 1-A was filed with the Commission as an exhibit to the complaint in Docket I. C. C. No. 12614 and is referred to therein. It was afterwards formally introduced in evidence at the hearings before the Commission, and each and every one of the plaintiffs in this case, or some one in his or its behalf, testified with reference to the correctness of the shipments therein contained which were

handled, respectively, by the plaintiffs as consignees. If there were any items in that exhibit with reference to shipments where no reparation could legally be made, the Yard Company could easily have ascertained such fact from its own records and have pointed out such items to the Commission. Furthermore, the record shows that after the Commission had determined that the defendants should make reparation, the Commission by its order directed that statements in accordance with Rule V of the Rules of Practice of the Commission, be prepared and submitted to the appropriate defendants for verification; that if not so verified within a reasonable time such statements under Rule V should be filed with the Commission, for check upon the record, with a view to the entry of an order awarding reparation (R. 156). The record shows that the complainants prepared the Rule V statements required by the order of the Commission, and submitted them to the Director General of Railroads and to the Union Stock Yard & Transit Company, *who refused to verify the same.* (R. 211). Notwithstanding this as well as the fact that the Director General of Railroads and the Yard Company had tendered to them at one of the hearings before the Commission, for the purpose of checking and cross-examination, Exhibit 1-A above described, no such contention was made before the Commission nor was the point raised in the trial court. It is too late to raise the question here. *Neither of said respondents at any time ever made any complaint to the Commission that its order contained items growing out of purely intrastate shipments. Nor was any proof as to the existence of such items attempted to be shown by evidence in the District Court.* Respondent Yard Company *deliberately chose to allow the record to remain silent on that point in order that it might afterwards take advantage of the same.* The law does not reward such tactics.

2. BY THE FEDERAL CONTROL ACT, A WAR MEASURE, AND BY SECTION 206-A OF THE TRANSPORTATION ACT, THE COMMISSION WAS GIVEN FULL JURISDICTION TO GRANT REPARATION ON ACCOUNT OF UNLAWFUL OR UNREASONABLE CHARGES EXACTED ON PURELY INTRASTATE SHIPMENTS DURING THE PERIOD OF FEDERAL CONTROL.

The gist of the decision of this court in the *Darnell-Taenzer* case, 245 U. S. 531, is that all who participate in the collection of an unlawful rate or charge are jointly and severally liable to make reparation therefor. This construction of the Act to Regulate Commerce in effect became a part of the act the same as though it had been expressly written therein. When Congress in 1920 enacted paragraph (c), Section 74 of the Transportation Act, expressly conferring jurisdiction on the Commission to grant reparation on intrastate traffic during the period of Federal Control, is it logical to assume that Congress intended to bring about a result whereby the Interstate Commerce Commission would be given full jurisdiction to grant reparation as against one joint tort feasor and have no jurisdiction to grant reparation against another joint tort feasor in the same transaction?

A somewhat analogous question was involved in *Mellon* v. *World Publishing Co.*, 20 Fed. (2d) 613. There the question arose as to whether the Director General was liable to make reparation as to charges of carriers not taken over under Federal Control. The court, on page 617, says:

> "It is further said that some of the shipments passed part way en route over a line or lines not then under Federal Control, and as to these the Director General was not liable, at least to the extent of that part of the charges going to such line. *But in each instance the whole through charge was exacted by and paid to the delivering carrier, which was under Federal Control, hence the Director General received all of those payments.*" (Our italics.)

The fact that the Yard Company was never under Federal Control does not alter the situation in the least. Jurisdiction of the Yard Company may rest alone on the proposition that it was a carrier subject to the provisions of the Act to Regulate Commerce; that the Interstate Commerce Commission was invested with special jurisdiction in cases arising during the period of Federal Control; that as a necessary incident to that jurisdiction the Commission had the right to hold liable another corporation, whose charges were on file before the Interstate Commerce Commission, who assisted and cooperated with the line-haul carriers, operating under Federal control in the enforcement and collection of such intrastate charges.

Missouri Pacific R. R. Co. v. *Ault*, 256 U. S. 554, is conclusive in principle on this question. There the court on page 559 says:

> "The plain purpose of the above provision (referring to Federal Control Act) was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President. * * *"

The Federal Control Act clearly conferred on the Interstate Commerce Commission jurisdiction to award reparation on account of unreasonable and unlawful rates, charges and practices during the period of Federal Control. The Federal Control Act was a war measure in which the authority of the United States was supreme and exclusive. Therefore, in cases which arose during the period of Federal Control involving a practice to exact an unlawful charge from the shipper where all who participate in such practice or jointly and severally liable to make reparation, no distinction can be drawn between the power of the State over intrastate shipments and the power of the Interstate Commerce Commission over interstate mat-

ters. As is said by the Supreme Court of Illinois in *Davis* v. *Keystone Steel & Wire Co.*, 317 Ill. 278, at page 291:

> "It is immaterial whether the demurrage accrued on interstate or intrastate shipments, because authority to enforce intrastate rates as well as interstate rates was conferred on the President by the act of Congress of August 29, 1916, and the act of March 21, 1918,—the Federal Control Act."

Whether the Yard Company was unloading an interstate shipment or an intrastate shipment, it was acting as an agency or instrumentality of the line-haul carriers in performing that service. The rates of the line-haul carriers included compensation to themselves for such service. The unlawful charges were collected not on authority of the Yard Company tariff, but on the authority of the extra 25 cents in the line-haul carriers freight bills.

There can be, as is said by the Supreme Court of the United States in *Chicago, Rock Island & Pacific Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426, no divided authority over interstate commerce, and the regulations of Congress on that subject are supreme. The court, on page 435, says:

> "The elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power."

Nor can there be a divided authority of the State and the Interstate Commerce Commission with reference to intrastate shipments arising during Federal Control in a case where charges on such shipments are exacted through

a practice between a corporation formally taken under Federal Control and one not so formally taken over. *The Federal Control Act was a war measure on a subject concerning which Congress had the paramount and exclusive power.* It expressly conferred jurisdiction on the Interstate Commerce Commission to grant reparation with reference to all unreasonable and unlawful rates and charges collected by the Director General during the period of Federal Control, *including interstate, foreign and intrastate traffic,* and necessarily took away from the State during the period of Federal Control jurisdiction of unreasonable and unlawful charges collected by the Director General of Railroads and growing out of purely intrastate shipments. The authority which the State had before the passage of this act to deal with unreasonable and unlawful charges growing out of purely intrastate shipments was thereby suspended during that period in every case where the Interstate Commerce Commission had jurisdiction of one of the joint participants in the unlawful practice. The unlawful charges of the line-haul carriers in this case were collected by the Yard Company and turned over to the line-haul carriers operating under Federal Control during the period of Federal Control. This brought the case within the perview of the Federal Control Act and gave the Interstate Commerce Commission complete and all-inclusive jurisdiction to grant reparation both as against the line-haul carriers operating under Federal Control and the Yards Company.

VII.

THE CONTENTION THAT COMMISSION WAS WITHOUT JURISDICTION TO AWARD REPARATION AGAINST THE YARD COMPANY IN DOCKET NO. 9977 AND THAT THEREFORE THE ORDER OF THE COMMISSION OF DECEMBER 12, 1927, IS VOID AS AGAINST THE YARD COMPANY, IS UNTENABLE AND BASED ON HYPERCRITICAL AND FAR-FETCHED CONCLUSIONS.

This point is also a new point not noticed in the opinion of the Circuit Court of Appeals or in the opinion of the District Court. As heretofore stated, the motion made by respondent Yard Company in the District Court, to direct a verdict for the Union Stock Yard & Transit Company (R. 52 to 54), specifically enumerates the various grounds upon which said motion is predicated. *The ground hereinabove mentioned in the caption of this subdivision is not mentioned.* Under the authorities cited on this point in subdivision VI of this brief, that question is not here subject to review.

In arguing this point counsel subject the language of the complaints filed with the Interstate Commerce Commission to the same or a greater degree of certainty than is required in an indictment or criminal complaint, wholly forgetting that in accordance with the decisions of the courts and of the Commission and its rules the complaint may be informal and need not be drawn in compliance with the rules relating to pleadings in the courts. Furthermore, the contentions made are unfair and place an unnatural and distorted meaning on the language of the complaints.

It is here said that the only complainant named in Docket I. C. C. No. 9977 was the Chicago Live Stock Exchange, and that that complaint must be construed to be exclusively the complaint of the Chicago Live Stock Ex-

change. Reference to the complaint filed in I. C. C. No. 9977 shows that this statement of opposing counsel is wholly unjustifiable. Paragraph 1 (R. 245) expressly states that the complaint is brought on behalf of the members of the complainant's association, severally and collectively; that said membership consists of the live stock commission merchants engaged in business at the Union Stock Yards; that said association represents every shipper and receiver of live stock at every station in the United States shipping to and from the public stock yards located at the Union Stock Yards in the City of Chicago, Illinois; that its patrons are located throughout the United States, and particularly throughout the territory in which the Chicago market is located. The prayer of the complaint (R. 256) recites that the complaint is brought in behalf of itself and its individual members and their patrons, and prays that reparation be made to the complainant's members and their patrons by way of reparation for the unlawful charges with reference to the additional 25 cents per car; and further prays that the Commission shall determine that the complainant's members and patrons are entitled to an award of damages under the provisions of the Interstate Commerce Act; and concludes with a general prayer for general relief such "as the Commission may consider proper in the premises." It is true that the petition filed in 9977 did not *at that time* specifically name the plaintiffs in this case, and did not *at that time* specifically name their patrons in whose behalf the complaint was filed, but inasmuch as the plaintiffs in this case constituted the entire membership of the Chicago Live Stock Exchange, and inasmuch as no commission merchant could transact business in the Union Stock Yards under the conditions then prevailing, it is certain that the complaint which set forth that the complaint was brought in behalf of the members necessarily meant petitioners because they were shown to

be the members of the Exchange. That fact is clearly established by the findings of the Commission (R. 149). The identity of the shippers interested is made definite and certain by the allegations of paragraph 1 of the complaint filed in I. C. C. No. 9977 (R. 245), as follows:

> "that the association represents every shipper and receiver of live stock at every station in the United States shipping to and from the public live stock market located at the Union Stock Yards in the City of Chicago, Illinois."

Furthermore, the exact identity of the shippers referred to in Section 1 of the complaint in I. C. C. No. 9977 and in the prayer of the complaint in I. C. C. No. 9977, was made definite and certain by the filing of a list of the names of the particular shippers referred to. The filing of this list of names was by authority of the Commission at a hearing before the Commission on the 20th day of May, A. D. 1919, (Defendants' Exhibit 7, R. 269). The request to file this list of the names of the shippers demanding reparation was made in the presence of counsel for the defendants who made no objection. (Record of Interstate Commerce Commission page 1926; Defendants' Exhibit 7, R. 269). Within the two-year period required by the Statute of Limitations, and on June 16, 1919, a full and complete list of the shippers in whose behalf reparation was asked in I. C. C. No. 9977, was filed with the Commission, which filing, under the established rule of procedure adopted by the Commission, was sufficient to stay the operation of the Statute of Limitations. The statement of counsel for the Yard Company, on page 90, that the list did not include appellants, who were the commission men, is not a true statement of the actual fact. The list itself, which was introduced in evidence in the District Court, refutes this statement. The items of charges covered by the instant suit are limited to charges paid during Fed-

eral Control. *The line-haul carriers paid to petitioners all items included in the award of reparation arising out of shipments prior to Federal Control.* The question raised by respondent is therefore a moot question.

It is further said by opposing counsel on page 90: "The record does show, however, that it (referring to said list) was not filed as an amendment to the complaint in Docket I. C. C. No. 9977." This is also incorrect. It is true that the defendants in the District Court called Thomas H. Gillis, the Assistant Secretary of the Interstate Commerce Commission, who testified that he had examined the record and found no *written* amendment on file in the record in Docket I. C. C. No. 9977. This witness admitted upon cross-examination that he would have no information about an amendment made upon the record in open hearing (R. 296). In accordance with the informal procedure adopted before commissions, amendments are often made verbally at the hearings and shown by the official minutes of the proceedings; such informal amendments have always been held sufficient.

"Reparation proceedings before the Commission properly may be and frequently are quite informal. Many claims on account of excessive charges are dealt with and finally disposed of without formal pleading or proof, by means of correspondence carried on by the Commission with claimants and carriers respectively." (*Lewis-Simas-Jones* v. *Southern Pacific Co.*, 283 U. S. 654.)

Counsel for the Yard Company cite *Michigan Hardwood Mfrs. Assn.* v. *Freight Bureau*, 27 I. C. C. 32, in which the Commission held that in order to stop the running of the Statute of Limitations under the two-year period it was necessary that the name of the person in whose behalf damages were sought must be stated. The rule announced was fully complied with in the instant case. *The list of*

the names of the shippers in whose behalf reparation was sought, including the names of petitioners in this case, were contained in the printed list filed with the Commission on June 16, 1919, *under authority given at the meeting of the Commission on May* 20, 1919. (Defendants' Exhibit 7, R. 269). Counsel for the Yard Company were present when permission was obtained in open session before the Commission to file the names of the shippers in whose behalf reparation was sought (Original Ex. 7). There is no showing made here that they did not have full knowledge of the contents of the list of names that was filed on June 16, 1919.

VIII.

THE CONTENTION THAT THE COMMISSION DID NOT HAVE BEFORE IT ANY COMPETENT EVIDENCE UPON WHICH IT COULD DETERMINE THE AMOUNT OF REPARATION AWARDED BY IT IS UNTENABLE AND CLEARLY REFUTED BY THE RECORD OF THE INTERSTATE COMMERCE COMMISSION ADMITTED IN EVIDENCE IN THE DISTRICT COURT.

It is most significant that the Director General of Railroads, although represented by able counsel, has not been sufficiently impressed with this contention to even mention it.

It is said by counsel for the Yard Company that the only evidence which the Commission had before it on which it could possibly have based its order of December 12, 1927, was an exhibit identified as Exhibit 1-A and offered and received in evidence on the hearing held by the Commission on October 3, 1922, (Defendants' Exhibit No. 9), and offered and received in the trial court as Defendants' Exhibit No. 37 (R. 283), and consisting of thousands of sheets showing the details with respect to the individual shipments upon which the order of reparation was based. *This state-*

ment is not in accord with the facts. In addition to Exhibit 1-A, the Commission heard the testimony of approximately a hundred witnesses on the subject. (Defendants' Orig. Ex. 8, Defendants' Orig. Ex. 9, Defendants' Orig. Ex. 10, Defendants' Orig. Ex. 11.)

THERE IS AN ABUNDANCE OF EVIDENCE TO PROVE ALL ITEMS FOR WHICH REPARATION WAS GRANTED

The record of the Interstate Commerce Commission introduced in evidence in this case shows that two copies of Exhibit 1-A were filed with the Commission on February 25, 1921, (R. 226-227), the same day the complaint in Docket No. 12614 was filed. The record further shows the foundation for the admission of Exhibit 1-A was made and the same introduced and received in evidence at the hearing of the Commission on July 14, 1921 (Defendants' Exhibit No. 8, R. 269). The statement made by counsel on page 110 of their argument that prior to the time of the hearing on July 14, 1921, the Yard Company knew nothing about it is not supported by anything in the record. The record of the proceedings before the Commission clearly shows the proper foundation and preliminary proof as to the correctness of that Exhibit 1-A, containing in great detail complete information as to each and every shipment involved in the claim for reparation involved in this case, showing the name of the consignor, the name of the consignee, the car initial and number, the date of delivery, the waybill number and date, the originating station, the rate commodity and amount of reparation claimed, was duly made by competent testimony at the hearing before the Commission. (R. 265.) It was prepared by Mr. H. R. Park, the Traffic Manager of the Chicago Live Stock Exchange, and for each member thereof, who is shown by the record of the Interstate Commerce Commission to have been an expert on the subject of rates, charges, classifications, regu-

lations, practices and tariffs, both of the line-haul carriers and of the Yard Company, and thoroughly familiar with the methods employed by the Yard Company and the line-haul carriers with reference to the handling and collection of the general transportation charges of the line-haul carriers and the loading and unloading charges of the Yard Company (R. 216).

The record further shows *without the slightest contradiction* that the information contained in Exhibit 1-A was procured by him personally and through his assistants from the original freight bills, records of the Yard Company and of the line-haul carriers, and from the records and bank-check stubs of the commission men (R. 220-229).

In addition to the testimony of Mr. Park showing the correctness of the contents contained in Exhibit 1-A, the record before the Interstate Commerce Commission shows that each and all of the petitioners in this case, or some competent person in their behalf having personal knowledge on the subject, testified as to the correctness of the items set forth in Exhibit 1-A so far as the same represented the shipments made by the shippers respectively represented by the plaintiffs in said proceeding before the Interstate Commerce Commission. (See Defendants' Exhibits Nos. 8, 9, 10, 11, referred to at pages 269, 270, 271 of the Record.)

Isolated Statements from Testimony of a Few Witnesses, Misleading.

In this connection counsel for the Yard Company on pages 99-100 of their brief set forth excerpts from the testimony of a few of the hundred or more witnesses who testified on the subject and state that the excerpts so selected are typical of the testimony of the hundred or more witnesses who testified with reference to the same matter.

An examination of these excerpts and of the record before the Interstate Commerce Commission will show that here again counsel for the Yard Company select and designate as typical certain favorable isolated statements from the testimony of two of the hundred and more witnesses testifying with reference to the same subject matter, pick flaws in their answers, and then attempt to impress the court with the idea that the testimony of all the witnesses on this subject was subject to the same criticism. The record before the Interstate Commerce Commission, however, taken as a whole, shows beyond question that the items contained in Exhibit 1-A were true and correct and that the evidence to show such fact is furnished by the testimony of at least a hundred witnesses. *Furthermore, there never at any time was the slightest effort made by counsel for the Yard Company or any of the defendants to contradict a single item contained in Exhibit 1-A.*

Objection Before Commission General, Vague and Ambiguous.

The record shows that when Exhibit 1-A was tendered in evidence at the hearing on July 14, 1921, counsel for the Yard Company made no objection whatever to its introduction. *The first and only objection which was made by counsel for the Yard Company to Exhibit 1-A as evidence is shown on page 42 of the proceedings of the Commission of October 3, 1922* (Defendants' Exhibit No. 9, R. 270). The objection was:

> "I object to the offer on behalf of Union Stock Yard & Transit Company as being incompetently and irrelevantly proved, and there has been no sufficient identification to make the offer competent as regards that document."

It will be noted that the objection is not only vague but also extremely ambiguous. At most it was very general objection not specifically stating the particular reasons

for the objection. The law is well established that objections to the introduction of testimony, especially testimony of a documentary character, must be sufficiently specific as to point out the particular objection urged so that if the objection is well taken it may be remedied by the party offering the evidence. (*Wyman* v. *City of Chicago*, 254 Ill. 202; *Grand Pass Shooting Club* v. *Crosby*, 181 Ill. 266; *B. & O. S. W. Co.* v. *Brubaker*, 217 Ill. 462.)

Furthermore, it is to be noted that the Examiner at the time Exhibit 1-A was introduced in evidence specifically stated to counsel for the Yard Company:

> "It will be received as Exhibit 1-A *and counsel for the defendants will be allowed the opportunity to go through it item by item and call for the witnesses who have purported to have received the individual shipments* for such cross-examination as is competent and relevant." (Defendants' Exhibit No. 9, R. 270, p. 42.)

No Effort Made to Question Any Item in Award of Reparation:

The record shows that never at any time did the Director General or the Yard Company produce a scintilla of evidence to contradict the correctness of a single item contained in Exhibit 1-A, although, as heretofore pointed out, the Director General of Railroads and the Yard Company had complete records of their own by which it could be demonstrated to a mathematical certainty each and every shipment of live stock involved in the claim of the petitioners before the Interstate Commerce Commission for reparation. The court will take judicial notice of the fact that railroads and industries in general necessarily keep detailed books and records of their business transactions. (*Nash* v. *Classen*, 163 Ill. 409.) Having in their possession and under their control complete and detailed information on the basis of which they might check and

verify the items set forth in Exhibit 1-A, and having failed to introduce any evidence as to any item contained in said Exhibit, it must be conclusively presumed that the items therein contained are correct, as is said by the Supreme Court of Illinois in *People* v. *Small:*

> "When a party fails or refuses to produce books and papers shown to be in his possession or under his control, his opponent may give secondary proof of their contents or establish his case by circumstantial evidence, *and if such secondary or circumstantial evidence is vague, imperfect and uncertain as to dates, sums, etc., every intendment and presumption shall be against the party who might remove all doubt by producing better evidence.*" (Italics ours.)

(*People* v. *Small,* 319 Ill. 437; *Missouri, K. & T. R. R.* v. *Elliott,* 102 Fed. 96, affirmed in 184 U. S. 695; *Armstrong* v. *Belding Bros.,* 296 Fed. 728, certiorari denied in 265 U. S. 585.)

Can anyone suppose for a moment that the Yard Company, having in its possession the original records on the basis of which any item contained in Exhibit 1-A could be attacked, did not as a matter of fact check the items contained in Exhibit 1-A with their own records? To say that they did not do so would be tantamount to saying that they were guilty of an utter indifference as to whether or not the items contained in Exhibit 1-A were or were not correct. Such an indifference cannot be imputed to the respondents, who have so strenuously, by every possible means, attempted to defeat the claims for reparation herein. To show the minuteness with which counsel for the Yard Company scrutinized Exhibit 1-A, and the proof offered to sustain it, we quote from page 101 of their argument:

> "The people who helped Mr. Park make the exhibit up are not identified beyond the statement that they were his assistants."

If counsel for the Yard Company wanted to know the names of the assistants it would have been a very easy matter to have asked concerning that matter on Mr. Park's cross-examination. But as a matter of fact what difference does it make what the names of the assistants were?

Under the modern rule experts are allowed to examine voluminous accounts, books and records and give their conclusions as to their contents. (*Reinke* v. *Sanitary District of Chicago*, 260 Ill. 380; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117; Wigmore on Evidence, Volume 3—2nd ed.—Sec. 1530.

As we have heretofore pointed out, the procedure before the Interstate Commerce Commission is necessarily much more informal and practical than the proceedings in the courts, and this court has held over and over again that the Commission is not to be controlled or hampered too narrowly by technical rules as to the admissibility of proof.

It is said by this court in *I. C. C.* v. *Baird*, 194 U. S. 25, at page 44:

> "The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law, where a strict correspondence is required between allegation and proof."

METHOD OF PROOF SIMILAR TO METHOD APPROVED IN SPILLER CASE, EXCEPT PROOF HERE WENT MUCH FURTHER.

The facts in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, are almost identical with the facts in this case so far as the proposition of properly proving claims for

reparation before the Commission is concerned. In that case this court, on page 127, says:

> "Thousands of carload shipments were in question, but the points in real controversy were few, and there was a natural desire on all sides to expedite the hearing. In the main, counsel for the carriers cooperated in facilitating the investigation. It was not in dispute that all shipments under inquiry were made during a period when the tariff rates were under investigation, and that afterwards those rates were determined by the Commission to have been excessive. It appeared that itemized claims for reparation had been made out *in duplicate* (*one copy of each being filed*), *in the names of the parties alleged to have made shipments of cattle as owners during the period in question, that these were based in most cases upon data furnished by the commission houses at the several points of destination, as taken from their books, in other cases by the shippers themselves, and that they were computed by applying the excess charges,* as determined to the actual weights of the shipments where known, in other cases to the minimum carload weights. There was evidence that few of the cattle shippers kept books, they relying upon the commission companies to do this, *and that such companies were the consignees of the cattle, and made it a practice on receiving a shipment to pay the freight, sell the cattle, and remit the proceeds to the owner after deducting the freight paid and other charges.*" (Italics ours.)

It was objected in that case by counsel for the carriers that no sufficient foundation was laid for the introduction in evidence of the statements on which the award for reparation was made, they characterizing it as hearsay. The court, however, disposes of this objection at pages 120-130 and says:

> "The only witness sworn was Mr. Williams, assistant secretary of the Cattle Raisers' Association, *who had gathered the data upon which the claims were based, mostly from commission merchants, in some instances from the cattle shippers.* He had prepared the claims, had spent much time and pains in investigating them, and in the course of his duties had vis-

ited several of the points of destination and examined the books and records of the commission merchants to ascertain the method in which their business was conducted and records kept. It was he who testified as to the customary course of business of cattle shippers and commission merchants. He had been connected with the Cattle Raisers' Association for about eight years, and might be presumed to have some general familiarity with the business in addition to that gained in the special study he had made of it while investigating the claims. His explanation of the method of business and the details of the claims was accepted, and accepted without objection, very much as the testimony of an expert witness might have been accepted. *Whether he had shown such special knowledge as to qualify him to testify as an expert was for the Interstate Commerce Commission to determine;* and its decision thereon is not to be set aside by the courts unless clearly shown to have been unfounded, which cannot be said in this case. *Stillwell Mfg. Co.* v. *Phelps*, 130 U. S. 520, 527; *Montana Ry. Co.* v. *Warren*, 137 U. S. 348, 353." (Italics ours.)

What was said by this court in the *Spiller* case with reference to the testimony of Mr. Williams, the assistant secretary of the Cattle Raisers' Association, applies equally to the testimony of Mr. H. R. Park, the Traffic Manager of the Chicago Live Stock Exchange.

IX.

THE CONTENTION THAT THE AWARD OF REPARATION HERE INVOLVED IS VOID BECAUSE THE COMMISSION IN MAKING IT CONSIDERED EVIDENCE NOT IN THE RECORD BEFORE IT IS NOT IN ACCORDANCE WITH THE FACTS.

Here again it is to be noted that the Director General, although represented by able counsel, has been so little impressed with this contention that it was not deemed fit to even mention it.

We concede, of course, that nothing can be treated as

evidence by the Commission unless it is introduced before the Commission as such. The situation presented in *United States* v. *A. & S. Ry. Co.*, 265 U. S. 274, cited by respondent, is not at all similar to the situation here present.

There is no basis in truth for the conclusion of counsel for the Yard Company that the Commission considered evidence not properly introduced before it. Counsel for the Yard Company in the trial court introduced no evidence whatever to show there was a basis of fact for this contention, *as they might easily have done if it were true.* If the Commission considered matters not introduced in evidence before it, it would have been easy for counsel for the Yard Company to have produced in the trial in the District Court some member or officer of the Commission to substantiate the point. Opposing counsel quote from the order of the Commission of May 14, 1928, (R. 211), as follows:

> "Subsequently complainants filed *with us tabulated statements* in which were embodied in convenient form summaries, *separated as to participating defendants,* of the numbers of shipments received by and amounts of reparation due to each of the parties *shown in the detailed statements previously filed.* After these summaries had been checked upon the record we issued the aforementioned order of December 12, 1927." (Italics ours.)

Now what were the "tabulated statements" and "summaries" which counsel for the Yard Company seek to make it appear were in the nature of evidence? When we read the previous order of the Commission of June 2, 1925, (R. 156), all this is made perfectly clear.

There we find the following:

> "The foregoing complainants and interveners found entitled to reparation *should severally prepare statements* in accordance with Rule V of the Rules of Practice, *separated as to participating defendant carriers,* including as a defendant the Stock Yard Com-

pany and also including the Director General of Railroads, as Agent, in appropriate cases in No. 12614. The statements should be submitted to the appropriate defendants for verification."

"TABULATED STATEMENTS" AND "SUMMARIES" WERE MERELY RULE V STATEMENTS.

The record shows that the petitioners in this case complied with the above request and direction of the Commission and prepared in accordance with Rule V of the Commission (Defendants' Exhibit 45, R. 291-292) "tabulated statements in which were embodied in convenient form summaries, separated as to the participating defendants," of the number of shipments received by and the amount of reparation due to each of the parties on the sole basis of the proof of such claims already in evidence before the Commission. The tabulated statements referred to in the report of the Commission were merely clerical compilations and allocations of items contained in Exhibit 1-A heretofore referred to. The fact of the matter is, as counsel for the Yard Company well know and as is clearly shown by reading the language of the order of May 14, 1928, in conjunction with the language of the order of June 2, 1925, *these tabulated statements and summaries were nothing more or less than the statements required by Rule V of the Rules of Practice of the Commission.* They were not evidence, nor were they intended as evidence. *They were merely tabulated statements and summaries of claims not presented as evidence but merely as statements of claim.* As well might one contend that the filing of a statement of claim in the Probate Court or in some other court was tantamount to introducing the same in evidence. As above stated, no new or additional evidence was heard by the Commission.

CONCLUSION.

While the record in this case presents strong grounds from the standpoint of the equities of the case for reversing the judgment of the District Court and the judgment of the Circuit Court of Appeals, the momentous importance and far-reaching effect of the decision of this court on such questions is of first importance. A decision by this court approving the practice resorted to by respondents to settle a controversy between themselves by passing on the burden of such controversy to the shipper, would greatly weaken the power and authority of the Commission and create a precedent fraught with danger.

We again respectfully submit that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit and the judgment of the District Court be reversed and the cause remanded to the District Court with such directions as this court may deem appropriate.

Respectfully submitted,

FRANKLIN J. STRANSKY,
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Attorneys for Petitioners.

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CHARLES

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, Copartners trading as ADAMS & KITCHEN, et al., *Petitioners,*

vs.

ANDREW W. MELLON, Director General of Railroads, and UNION STOCK YARD & TRANSIT COMPANY, *Respondents.*

BRIEF OF ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, RESPONDENT, IN RESISTANCE TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SIDNEY F. ANDREWS, GENERAL SOLICITOR UNITED STATES RAILROAD ADMINISTRATION,

Hurley-Wright Building, Washington, D. C.,

A. A. McLAUGHLIN, 1115 Bankers Trust Building, Des Moines, Iowa,

Counsel for Respondent, Andrew W. Mellon, Director General.

SUBJECT INDEX.

Page

I. Statement to correct inaccuracies and omissions in petitioners' summary statement 1

II. Summary of Argument 14

III. Argument 19

Point I. Petitioners assume an erroneous and misleading state of facts in support of "reasons relied upon for allowance of writ", as set forth in petition, and in "Specifications of errors" relied on in their brief in support of petition, in the following particulars:

A. Petitioners state that tariffs of the line-haul carriers included the service of loading and unloading the livestock at the Union Stock Yards, Chicago, whereas such tariffs included only transportation to the Stock Yards and the absorption of a specific amount in cents per car for loading and unloading 19

B. Petitioners ignore the fact that the Stock Yard Company was an independent common carrier holding itself out to perform the loading and unloading service on its own property devoted to public use, for which it published a tariff of its charges 24

C. Petitioners ignore the fact that the loading and unloading of livestock at the Stock Yards was a part of the transportation thereof performed by an independent common carrier with its own employes and upon its own premises devoted to public use 24

D. Petitioners repeatedly state that the Stock Yard Company was the agent of the line-haul carriers in performing the service of loading and unloading livestock, whereas the record shows it was an independent connecting common carrier performing its service under and pursuant to its published tariffs and without any arrangement or contract with the line haul carriers, and without any joint tariff in respect to same 27

E. Petitioners ignore the fact that the Stock Yard Company did not join or concur in the tariff of the line-haul carriers and that the line-haul carriers did not join or concur in the Stock Yard Company's tariff 28

F. Petitioners ignore the testimony conclusively showing no relation of agency, either by reason of contract or tariff provisions existed 28

G. Petitioners assert that the Stock Yard Company did not collect the charges in controversy, whereas the Commission found that it did so. (First Opinion R. 123). The undisputed evidence so shows and petitioners in their petition in bringing this suit so allege. (R 13) 31

H. The charge of the Stock Yard Company was limited to the service of loading and unloading 33

Point II. Common carriers engaged in interstate commerce are required to file tariffs of their charges with the Interstate Commerce Commission, and to maintain and enforce the same 35

Point III. The applicable tariffs were plain and unambiguous. No administrative function of the Commission was involved and the Circuit Court of Appeals did not infringe upon any jurisdiction of the Interstate Commerce Commission 38

Point IV. The absorption tariffs of the line-haul carriers limited and measured their legal right and obligation to contribute to the payment of the Stock Yard Company's charges 40

Point V. The Interstate Commerce Commission could not find the refusal of the carriers to absorb the increased charge of the Stock Yard Company was unreasonable or require the absorption of the same without evidence showing the line-haul rate, plus the terminal charge, was so high as to be unreasonable, unless the increased charge should be included in the absorptions provided for, nor without evidence and a finding that a failure to absorb such increased charge would result in discrimination 42

Point VI. The appeal to the Circuit Court of Appeals was from the judgment entered in the District Court and not from the reasons therefor announced by the District Judge, and since the Circuit Court of Appeals based its judgment of affirmance on an entirely different ground, the reasons announced by the District Judge may not be considered in determining whether petition for certiorari should be granted 44

Point VII. No question of public importance or other question on account of which a writ of certiorari should be granted, is presented 45

TABLE OF CASES CITED.

Baltimore & Ohio Railway Co. v. United States, 277 U. S. 291-301-2 17-43
Boardman & Co. v. S. P. Co., 37 I. C. C. 331 14-24
Covington Stock Yards v. Keith, 129 U. S. 126 15-26
Chicago Livestock Exchange v. Atchison, Topeka & Santa Fe Railway Co., et al., 52 I. C. C. 209 2-8-14-15-16
Chicago Livestock Exchange v. Atchison, Topeka & Santa Fe Railway Co., et al., 58 I. C. C. 164 9-15-16
Davis, Agent v. Cornwell, 264 U. S. 560-2 16
Davis, Agent v. Henderson, 266 U. S. 92-93 16-17-36
Florida East Coast Railway Co. v. United States, 234 U. S. 167 17
Furness Witting & Co. v. Yangtsze Insurance Company, 242 U. S. 430-4 18
Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285-294 17-39
Hunt Ferris & Co. v. C. & N. W. Railway Co., 68 I. C. C. 233-4 17-43
Interstate Commerce Commission v. Stickney, 215 U. S. 98-105 14-34-39
Interstate Commerce Commission v. Louisville & Nashville Railway Co., 227 U. S. 84-91 17-39
Interstate Commerce Commission v. C. B. & Q. R. R. Co., 186 U. S. 320 2-3-14
Keogh v. Chicago & North Western Railway Co., 260 U. S. 156-163 16-35
Layne & Co. v. Western Well Works, 261 U. S. 387-393 18
Louisville & Nashville Railway Co. v. Central Iron Works, 265 U. S. 59-65 16-36
Louisville & Nashville Railway Co. v. Maxwell, 237 U. S. 94-7-8 16-35
Magnum Co. v. Coty, 262 U. S. 159-163 18-46
Mellon, Agent v. Erb, 13 Fed. (2d) 752-3 (C. C. A. 9th Ct.) 16
United States v. Union Stock Yards & Transit Co., 226 U. S. 286 14-15-16-24-26
Wells Paper Co. v. P. R. R. Co., 62 I. C. C. 705 17-43

TABLE OF STATUTES CITED.

Act to Regulate Commerce, Section 1, Paragraphs 3 and 6, 49 U. S. C. A., Pages 11 and 12 16-26
Act to Regulate Commerce, Section 6, Paragraphs 1, 4, 6 and 7, 49 U. S. C. A., pages 239 and 240 17-29-40
Act to Regulate Commerce, Section 15, Paragraph 5, 49 U. S. C. A., page 426 9
28 U. S. C. A., Section 347, page 359 18-44

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, Copartners trading as ADAMS & KITCHEN, et al., *Petitioners*,

vs.

ANDREW W. MELLON, Director General of Railroads, and UNION STOCK YARD & TRANSIT COMPANY, *Respondents.*

BRIEF OF ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, RESPONDENT, IN RESISTANCE TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

For resistance to the petition for certiorari filed herein, Respondent Andrew W. Mellon, Director General of Railroads, respectfully shows to this Honorable Court:

I.

STATEMENT DEEMED NECESSARY TO CORRECT INACCURACIES AND OMISSIONS IN PETITIONERS' SUMMARY STATEMENT OF MATTERS INVOLVED.

The Stock Yard Company was created by a special act of the Legislature of Illinois, approved February 13, 1865,

with the right to construct necessary buildings, railroad tracks, loading and unloading platforms, for the accommodation of the business of a general Union Stock Yards for cattle and other livestock, and to construct, maintain and operate a railway for its yards and to connect with the tracks of all railroads terminating in Chicago. (R. 123-124.) The yards were constructed and tracks connecting with other lines of railroad were established, the shares of the Stock Yard Company being owned by the railroads terminating in Chicago until 1894, at which time the railroads divested themselves thereof, and have since said time had no pecuniary interest therein. During such period no charges were made for the use of the tracks in reaching the yards with trains of the line-haul carriers. After the line-haul carriers disposed of their interest, the Stock Yard Company made a trackage charge against the railroad companies for use of its tracks, which was assessed on a per car basis in the sum of 75c per car each way (loaded in and empty out). (Defendants' Exhibit 6, pages 475 and 476, not printed in record, but certified up as a part thereof).

A full history of the organization and development of the Stock Yard Company up to 1894 is contained in *Interstate Commerce Commission v. C. B. & Q. R. R. Co.*, 186 U. S. 320. A full history up to the time of the shipments in controversy is contained in the opinion of the Interstate Commerce Commission, dated February 11, 1919, in these proceedings in case entitled *Chicago Livestock Exchange v. Atchison, Topeka & Santa Fe Railway Co., et al.*, 52 I. C. C. 209. (R. 121-140). The facts are also fully and accurately stated in the opinion of the Circuit Court of Appeals. (R. 389-399).

Subsequent to the assessment of the trackage charge, the line-haul carriers continued to receive and transport shipments of livestock in carloads from and to the Stock Yards, transporting them with their own locomotives and crews, and continued to absorb the loading and unloading charges

in the sum of 25c for unloading and 50c for loading each car of livestock. After the assessment of such trackage charge, the line-haul carriers published their terminal tariffs containing a charge of $2.00 per car for the service of moving cars between the Stock Yards and points on their lines. This $2.00 charge was assailed by the shippers and was held unreasonable by the Interstate Commerce Commission, but the Commission's conclusion was overruled and the charge upheld in *Interstate Commerce Commission v. C. B. & Q. R. R. Co.*, 186 U. S. 320 (R. 124-125). The Stock Yard Company, from the beginning, performed the service of loading and unloading all livestock at the yards, and in 1867 established a charge of 50c per car for loading and 25c per car for unloading, which charge continued in effect until May 21, 1917. (R. 122-124).

In 1897 the Stock Yard Company leased all of its railroad property to the Chicago Junction Railway Company (for brevity hereafter referred to as Junction Company), for a period of fifty years, in consideration of a share of the net profits, the Stock Yard Company retaining to itself the loading and unloading platforms and yards, which it continued to operate, and the Junction Company thereafter operated the railroad property. (R. 124).

In 1911 an action was brought by the Interstate Commerce Commission in the Commerce Court to compel the Stock Yard Company and the Junction Company to file tariffs with the Interstate Commerce Commission covering their charges, in conformity with Section 6 of the Act to Regulate Commerce. The case went to the Supreme Court of the United States, where the contention of the Commission was upheld in 226 U. S. 286, and the Junction Company and the Stock Yard Company were both held to be common carriers and required to file tariffs with the Commission. (R. 125-126).

In compliance with such decision, the Stock Yard Com-

pany filed its tariffs with the Commission showing its charges for loading and unloading livestock. (R. 127).

In 1913, the lease with the Junction Company was cancelled and a new lease entered into by which the Stock Yard Company received a fixed rental for its property instead of a share of the net profits. The line-haul carriers filed tariffs covering their terminal charges, which included a provision that the line-haul carriers would absorb charges of the Stock Yard Company in the sum of 50c for loading and 25c for unloading each car of livestock received from or transported to the Stock Yards. (R. 223-225 and Exhibit 2 to Defendant's Exhibit 1. Exhibit 1 is a stipulation which is printed in the record, but the exhibits thereto are not printed, but certified up as a part of the record).

The language of the absorption tariff is:

"CARRIERS AS SHOWN WILL PAY THE UNION STOCK YARDS AND TRANSIT COMPANY'S CHARGES AS FOLLOWS:

Loading	Unloading
In cents per car	In cents per car
50	25 "

By tariffs filed with the Interstate Commerce Commission, effective May 21, 1917, the Stock Yard Company increased its loading and unloading charges 25c per car, so that the charges thereafter for such service became and were 75c per car for loading and 50c per car for unloading.

The line-haul carriers refused to pay the increased charges and did not amend their tariffs, but continued their absorptions under tariffs theretofore in effect and continued in effect. (R. 122-123).

The Stock Yard Company was maintaining a great public livestock market and the prompt unloading and release of livestock to it was essential to its activities. The counting, weighing and paying of charges before delivery was incompatible therewith. In consideration of such prompt release, the Stock Yard Company for many years had assumed the responsibility for counting the stock, checking its condition and collecting the freight charges. The freight bills were prepared by the line-haul carriers, delivered to the Auditor of the Stock Yard Company, who made collection from the commission men, who were the consignees, and proceeds were remitted to the carriers weekly. When the line-haul carriers refused to absorb the increased charges, the Stock Yard Company in its effort to make them do so, held the amount thereof out of the freight charges collected by it. The carriers protested and were making arrangements to collect their own charges, whereupon an understanding between the carriers and the Stock Yard Company was reached; pursuant to which the line-haul carriers in making out their freight bills, included the additional charge of the Stock Yard Company, stating in the bill that such charge is "Per U. S. Y. T. Co. No. 2." (The Stock Yard Company's tariff increasing its charges).

The bills as thus made out were collected by the Stock Yard Company from the commission men, who paid same out of the proceeds of the sale of the shipments, remitting net balance to shippers. (Testimony Witness Byers, Original Exhibit 6, pages 472 to 476, 496 to 498 and 504 to 512, original Exhibits certified to this Court, Printed Excerpts of said Exhibit 37 to 43).

This arrangement was made before Federal control of railroads and was followed during that period. Neither the Stock Yard Company nor its property was taken under Federal control. A copy of the Stock Yard Company's tariff increasing its charges is attached to Defendant's Exhibit 1 as

a part of Exhibit 1 thereto, original exhibits certified to this Court.

The line-haul carriers were not a party thereto and did not authorize or consent to the filing thereof. On the title page of such tariff, however, is the following: "The charge made by this Company for the service (as a carrier's agent) of loading and unloading livestock at the Union Stock Yards at Chicago, Illinois, is as follows, etc."

Then follows the charge of 50c per car for unloading and 75c per car for loading.

The Stock Yard Company had no authority from the line-haul carriers to file said tariff as their agent, or otherwise, (Testimony Mr. Henkle, General Manager Stock Yard Company, Defendant's Exhibit 6, page 344, original certified to this Court), nor was such tariff filed at instance of the line-haul carriers. (Testimony Auditor Chace, Stock Yard Company, Defendant's Exhibit 6, page 372; testimony Witness Byers, Freight Traffic Manager, C. & N. W. Railway Company, Defendant's Exhibit 7, page 1260, original certified to this Court).

The files of the Interstate Commerce Commission show no authority for the statement "as carrier's agent." (Testimony Witness Gohegan, Exhibit 11, page 1242, original certified to this Court).

The rates of the line-haul carriers were predicated on the livestock in carloads, being loaded and unloaded by the shippers. (Witness Byers, Defendant's Exhibit 6, page 459, original certified to this Court).

The tariffs of the line-haul carriers are with reference to the appropriate classifications. Line-haul tariffs refer to the absorption tariffs showing what terminal charges will be absorbed. (Witness Byers, Defendant's Exhibit 7, pages 1251-1252, original exhibit certified to this Court).

Official Classification applicable to roads east of Chicago required the use of Uniform Livestock Contract published

therein. Such contract provides that the livestock is received subject to the classifications and tariffs in effect and that the carrier "agrees to convey to its usual place of delivery at said destination, if on its road; otherwise to deliver to another carrier on the route to said destination"; also that the shipper shall load and unload the livestock.

Rule 8 on page 223 of said Classification also provides:

> "The consignor and consignee are responsible for loading and unloading the same, the carrier assuming no liability whatever in regard to loading and unloading."
>
> (Exhibit 3 to Defendant's Exhibit 1, original certified to this Court).

Western Classification applicable to western roads, Illinois Classification applicable to intrastate shipments in Illinois, and Consolidated Classification issued by the Director General during Federal control applicable to all roads, contain substantially the same provisions. (Exhibits 3, 4, 5 and 6 to Defendants' Exhibit 1, original certified to this Court).

Witness Byers testified that the classifications and tariffs of the carriers provide that the shipper must load and unload livestock. (Defendant's Exhibit 6, pages 455-6). Witness Mosier, Vice President, Chicago Livestock Exchange, testified that the livestock contracts covering transportation of livestock, long in use by the railroads, made the same provision. (Defendant's Exhibit 6, page 150).

On July 7, 1917, the Stock Yard Company issued a supplement to the tariff in which it had increased its charges, in which it sought to cancel such charges as a tariff matter, on the theory that it was no longer a common carrier and subject to the Commerce Act, and that it was not required to file tariffs of its charges with the Commission. The Commission suspended such supplement and set the matter down for hearing under I and S Docket 1118, and thereafter extended such suspension order from time to time, thus keep-

ing the tariff covering the Stock Yard Company's charges in effect.

On November 17, 1917, the Chicago Livestock Exchange filed a complaint with the Commission, which was docketed as No. 9977. (See Defendant's Exhibit 2, R. 243-256). This was before Federal control. In such complaint it was charged that the collection of the 25c additional charge from the shippers was in violation of Sections 1, 2 and 3 of the Act to Regulate Commerce. Dockets I and S 1118 and No. 9977 were consolidated, and after hearing, the Commission on February 11, 1919, in opinion reported 52 I. C. C. 209, dismissed the complaint. (Plaintiff's Exhibit 1, R. 121-141). In that proceeding the Stock Yard Company insisted that by reason of the change in the form of its lease to the Junction Company, it was no longer a common carrier and therefore not obliged to file and maintain its tariffs. The Commission denied such contention and held that the Stock Yard Company was still a common carrier. (R. 129). The Commission reviewed its former decisions on the subject, and without referring to the classification and tariff provisions governing loading and unloading, held that the duty to load and unload livestock was the duty of the shipper. (R. 131-136 and 138-139). The Stock Yards were not under Federal control and the Director General was not a party to the proceeding. (R. 139). The suspension order was allowed to lapse and the Commission on March 13, 1919, amended its order dismissing the complaint by requiring the Stock Yard Company to file a supplement to its tariff, restoring and continuing the tariff sought to be cancelled in effect *nunc pro tunc*, as of December 31, 1918, the date the suspension order lapsed. (R. 237).

On March 31, 1919, the Stock Yard Company and the Chicago Livestock Exchange filed petitions for rehearing, and on April 14, 1919, the Commission reopened the proceeding and in the order doing so, named the Director General as a

respondent. (R. 237-238). While such proceeding was pending on rehearing, Congress enacted the Transportation Act of 1920 containing a provision amending Section 15 of the Act to Regulate Commerce as follows:

> "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stock yards shall include all necessary services of unloading and reloading en route, delivery at public stock yards of inbound shipments in suitable pens and receipt and loading at such yards of outbound shipments without extra charge therefor to the shipper, consignee or owner."
>
> (49 U. S. C. A. Section 15, Paragraph 5).

This provision became effective at the end of Federal control, March 1, 1920, and the railroad companies having been restored to the possession of their properties in compliance with this statute, amended their tariffs to provide for absorbing the entire loading and unloading charges.

On July 15, 1920, the Commission rendered its opinion on the rehearing, (58 I. C. C. 164), in which without serious discussion it adhered to its conclusion that the Stock Yard Company is a common carrier and that its services in loading and unloading were part of the transportation of such livestock, but announced that it was in error in its former opinion in holding that the duty to load and unload livestock was that of the shipper. In such opinion the Commission said:

> "As the services of unloading and loading are part of the transportation of live stock the collection of separate charges from the shippers for unloading or loading in addition to the rates on livestock from and to interstate points to and from the stockyards was an unlawful and unreasonable practice." (R. 144-145).

The complaint did not attack the line-haul rate or the terminal charge or the reasonableness thereof and no evidence was taken at any hearing on the question of the reasonableness thereof or of the charge made by the Stock Yard Company.

On February 25, 1921, the Chicago Livestock Exchange filed a further complaint with the Commission, charging that the collection of the 25c additional charge from the shippers was a violation of the Commerce Act. This complaint was docketed as No. 12614. The findings and opinion in the prior proceeding were relied on and recovery of the charges paid was sought in behalf of the commission men. (R. 238 and Defendant's Exhibit 3, R. 257-267). In the hearing thereon, proof was offered in behalf of petitioners in reference to the payment of the increased charge of 25c.

The following is illustrative:

Witness Burmister testified:

"Q. To whom did you pay the charges? To the stock yards company or the line-haul carriers?

A. The checks were all made out to the Union Stock Yard & Transit Company.

Q. And all of the charges paid to that company?

A. Yes, sir.

Q. Now, did you, in making settlement with the shippers, charge them for the unloading charges?

A. Yes, sir.

Q. As a matter of fact, now, Mr. Burmister, you are not out the twenty-five cents?

A. No, sir.

* * * * *

Q. Now, Mr. Burmister, is a uniform plan or uniform method of payment of charges followed by every commission firm?

A. Yes, sir.

(Defendant's Exhibit 9, pages 219 and 220, original certified to this Court).

Witness Gillogly testified:

"We deduct all charges before we pay the principal anything."
(Defendant's Exhibit 9, page 277, original certified to this Court).

Witness Wilson testified:

"Q. In every case where you paid this charge you collected the amount from the owner of the stock, didn't you?
A. Yes.

* * * * *

Q. You got the 25 cents, though, from the shipper?
A. We paid that with his own money, not with our money."
(Defendant's Exhibit 9, pages 363 and 364, original certified to this Court).

The additional 25c charge was collected on authority of the Stock Yard Company's tariff. C. C. Chace, Auditor of the Stock Yard Company, entrusted with the duty of making the collections, testified:

"Q. Do you know under what authority the loading and unloading charges were collected or assessed?
A. On the authority of the Stock Yard's tariff."
(Defendant's Exhibit 9, page 181, original certified to this Court).

Mr. Henkle, General Manager of the Stock Yard Company, testified that if the Commission would permit the Stock Yard Company to cancel its tariff containing the charge complained of, the Stock Yard Company would cease collecting same from the shipper. (Defendant's Exhibit 6, page 342, original certified to this Court). The Commission found:

"The Stock Yard Company collected and retained such charges from the shippers." (R. 123).

No. 9977 was consolidated with No. 12614 and the Commission's opinion thereon was rendered June 2, 1925. (Plaintiff's Exhibit 3, R. 147-157). In that opinion the Commission said:

> "Most of the reparation claimed is by the livestock commission merchants, members of the exchange, covering amounts collected from them for the unloading service at the stockyards. They seek reimbursement in their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers and also as factors and agents for and on behalf of the livestock shippers who were the consignors. While it is admitted that in each and every instance the charge which was paid by the commission merchant was subsequently charged back and collected from the consignors, this would not affect the right of the complainant consignees to awards of reparation."

Also:

> "We find that the following individuals, copartnerships, and corporations, parties of record, made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to reparation, as factors and agents for the shippers, with interest from date of payment."

Then follows names of the commission merchants, plaintiffs in this suit. (R. 151-156).

Following such opinion Rule V Statements were filed by the plaintiffs, and pursuant thereto, the award sued on was entered December 12, 1927. (R. 157-210). Such Rule V Statements consist of many thousand sheets contained in a large box, marked "Exhibit 37" and the original has been certified to this Court. (R. 283). The award was against the Stock Yard Company and Director General of Railroads jointly. They denied the validity of the Commission's award,

refused to pay the same, and this suit was commenced. The award is in favor of the plaintiffs; not the shippers, and in the petition recovery is sought in behalf of the commission men, the plaintiffs in their own right. (R. 4).

The shipments involved were made by in excess of 174,000 shippers. (R. 323).

The defendants in their answers contended that the findings of the Commission and its award were not supported by evidence, were contrary to law; that the commission men were not the real parties in interest; that they had paid the charges as agents of the shippers and from the shippers' own funds; that the charges were collected pursuant to the lawful tariffs of the Stock Yard Company, which it was bound to enforce; that the line-haul carriers were not permitted under their absorption tariffs to pay the additional charge of the Stock Yard Company; that the reasonableness of the rates was not involved in the proceeding, nor was the question of the amount the line-haul carriers might properly absorb involved. There were other defenses which are not material to the petition for certiorari, in view of the ground upon which the Circuit Court of Appeals affirmed the judgment of the lower court dismissing the petition.

The opinion of the Circuit Court of Appeals (R. 389) sets forth fully and accurately the facts upon which it is based. What the Court decided was that the Stock Yard Company as a common carrier engaged in interstate commerce in unloading and delivering livestock received from the line-haul carriers, to the consignees, was obliged by the Act to Regulate Commerce and by the determinations of this Honorable Court and the repeated orders of the Interstate Commerce Commission to publish tariffs of its charges for loading and unloading livestock, and having done so and not being permitted to withdraw and cancel such tariffs, was obliged to collect the charges provided for therein from the shippers for whose benefit the service was rendered, and having made

such collection, it was guilty of no unlawful act and the charges so collected could not be recovered back. The Circuit Court of Appeals did not adopt the reason relied upon by the District Court in denying right of petitioners to recover, but expressly refused to do so. (R. 394-395).

SUMMARY OF ARGUMENT.

I.

Petitioners assume an erroneous and misleading state of facts in support of "Reasons Relied upon for Allowance of Writ," as set forth in petition, and in "Specifications of Errors" relied on in their brief in support of petition, in the following particulars:

A. Petitioners state that tariffs of the line-haul carriers included the service of loading and unloading the livestock at the Union Stock Yards, Chicago, whereas such tariffs included only transportation to the Stock Yards and the absorption of a specific amount in cents per car for loading and unloading.

Boardman & Co. v. S. P. Co., 37 I. C. C. 331.
Chicago Livestock Exchange v. Atchison, Topeka & Santa Fe Railway Co., 52 I. C. C. 209.
Interstate Commerce Commission v. C. B. & Q. R. R. Co., 186 U. S. 320.
Interstate Commerce Commission v. Stickney, 215 U. S. 98-105.

B. Petitioners ignore the fact that the Stock Yards Company was an independent common carrier holding itself out to perform the loading and unloading service on its own property devoted to public use for which it published a tariff of its charges.

United States v. Union Stock Yards & Transit Co., 226 U. S. 286.

Chicago Livestock Exchange v. Atchison, Topeka & Santa Fe Railway Co., et al., 52 I. C. C. 209.
Chicago Livestock Exchange v. Atchison, Topeka & Santa Fe Railway Co., et al., 58 I. C. C. 164.

C. Petitioners ignore the fact that the loading and unloading of livestock at the Stock Yards was a part of the transportation thereof, performed by an independent common carrier with its own employes and upon its own premises devoted to public use.

Covington Stock Yards v. Keith, 129 U. S. 126.
United States v. Union Stock Yards & Transit Co., 226 U. S. 286.

D. Petitioners repeatedly state that the Stock Yard Company was the agent of the line-haul carriers in performing the service of loading and unloading livestock, whereas the record shows it was an independent connecting common carrier, performing its service under and pursuant to its published tariffs and without any arrangement or contract with the line-haul carriers, and without any joint tariff in respect to same.

E. Petitioners ignore the fact that the Stock Yard Company did not join or concur in the tariff of the line-haul carriers and that the line-haul carriers did not join or concur in the Stock Yard Company's tariff.

F. Petitioners ignore the testimony conclusively showing no relation of agency, either by reason of contract or tariff provisions, existed.

G. Petitioners assert that the Stock Yard Company did not collect the charges in controversy, whereas the Commission found that it did so; (First opinion R. 123), the undis-

puted evidence so shows and petitioners in their petition in bringing this suit so allege. (R. 13.)

H. The charge of the Stock Yard Company was limited to the service of loading and unloading.

II.

Common carriers engaged in interstate commerce are required to file tariffs of their charges with the Interstate Commerce Commission and to maintain and enforce the same.

49 U. S. C. A., Pages 11 and 12.

Act to Regulate Commerce, Section 1, Paragraph 3 and 6, appendix 47 and Section 6, Paragraph 7, appendix 49.

United States v. Union Stock Yards & Transit Co., 226 U. S. 286.

Chicago Livestock Exchange v. A. T. & S. F. Railway Co., et al., 52 I. C. C. 209 (R. 129).

Chicago Livestock Exchange v. A. T. & S. F. Railway Co., et al., 58 I. C. C. 164 (R. 144).

Louisville & Nashville Railway Co. v. Maxwell, 237 U. S. 94-7-8.

Keogh v. Chicago & North Western Railway Co., 260 U. S. 156-163.

Louisville & Nashville Railway Co. v. Central Iron Works, 265 U. S. 59-65.

Davis, Agent v. Cornwell, 264 U. S. 560-2.

Davis, Agent v. Henderson, 266 U. S. 92-93.

Mellon, Agent v. Erb, 13 Fed. (2d) 752-3 (C. C. A. 9th Circuit).

III.

The applicable tariffs were plain and unambiguous, no administrative function of the Commission was involved and the Circuit Court of Appeals did not infringe upon any jurisdiction of the Interstate Commerce Commission.

Great Northern Railway v. Merchants Elevator Co., 259 U. S. 285-294, and cases cited in note on page 295.

Interstate Commerce Commission v. Louisville & Nashville Railway Co., 227 U. S. 84-91.

IV.

The absorption tariffs of the line-haul carriers limited and measured their legal right and obligation to contribute to the payment of the Stock Yard Company's charges.

49 U. S. C. A., page 240.

Act to Regulate Commerce, Section 6, Paragraphs 1 and 7, appendix 48-49.

Davis, Agent v. Henderson, 266 U. S. 92-93.

V.

The Interstate Commerce Commission could not find the refusal of the carriers to absorb the increased charges of the Stock Yard Company was unreasonable or require the absorption of the same without evidence showing the line-haul rate, plus the terminal charge, was so high as to be unreasonable, unless the increased charge should be included in the absorptions provided for, nor without evidence and a finding that a failure to absorb such increased charge would result in discrimination.

Baltimore & Ohio Railroad Co. v. United States, 277 U. S. 291-301-2.

Florida East Coast Railway Co. v. United States, 234 U. S. 167.

Wells Paper Co. v. Pennsylvania R. R. Co., 62 I. C. C. 705.

Hunt, Ferris & Co. v. Chicago & North Western Railway Co., 68 I. C. C. 283-4.

VI.

The appeal to the Circuit Court of Appeals was from the judgment entered in the District Court, and not from the reasons therefor announced by the District Judge, and since the Circuit Court of Appeals based its judgment of affirmance on an entirely different ground, the reasons announced by the District Judge may not be considered in determining whether petition for certiorari should be granted.

Section 347, U. S. C. A., Title 28.

VII.

No question of public importance or other question on account of which a writ of certiorari should be granted, is presented.

Furness, Witting & Co. v. Yang'tsze Insurance Co., 242 U. S. 430-434.

Layne & Co. v. Western Wellworks, 261 U. S. 387-393.

Magnum Co. v. Coty, 262 U. S. 159-163.

ARGUMENT.

I.

PETITIONERS ASSUME AN ERRONEOUS AND MISLEADING STATE OF FACTS IN SUPPORT OF "REASONS RELIED UPON FOR ALLOWANCE OF WRIT", AS SET FORTH IN PETITION, AND IN "SPECIFICATIONS OF ERRORS" RELIED ON IN THEIR BRIEF IN SUPPORT OF PETITION, IN THE FOLLOWING PARTICULARS:

A. Petitioners state that tariffs of the line-haul carriers included the service of loading and unloading the livestock at the Union Stock Yards, Chicago, whereas such tariffs included only transportation to the stock yards and the absorption of a specific amount in cents per car for loading and unloading.

The tariffs of the line-haul carriers covering transportation to the Stock Yards were not offered in evidence. The absorption tariffs in which all line-haul carriers joined, known as the "Lowry Tariff" and covering terminal charges which would be absorbed by the line-haul carriers was offered in evidence. Such tariff is attached to Defendant's Exhibit 1 as Exhibit 2 thereto. This exhibit is not printed in the record, but the original was certified as a part thereof and is before the Court. The absorption tariff, page 37, provides:

"CARRIERS AS SHOWN WILL PAY THE UNION STOCK YARDS AND TRANSIT COMPANY'S CHARGES AS FOLLOWS:

Loading	Unloading
In cents per car	In cents per car.
50	25 "

All line-haul carriers joined in such tariff. The rates of the line-haul carriers were predicated on the livestock being loaded and unloaded by the shippers. (Witness Byers, Defendant's Exhibit 6, page 459; not printed in record, but original certified up as a part thereof.)

The tariffs of the line-haul carriers were with reference to the appropriate classifications and referred thereto, and to the absorption tariff for the terminal charges that would be absorbed. (Witness Byers, Defendant's Exhibit 7, pages 1251 and 1252, not printed in record, but certified up as a part thereof.)

In Defendant's Exhibit 1, it is stipulated by the parties that the classifications provide "general regulations, form of contracts and terms and conditions for the said transportation by said line-haul carriers." (R. 297, Paragraph 12 and Paragraph 16; R. 298, Paragraph 20; R. 299, Paragraph 23.)

The Classifications provided:

> "The consignor and consignee are responsible for the loading and unloading the same, the carrier assuming no liability whatever in regard to the loading and unloading."

(Official Classification, Rule 8, page 223, Exhibit 3 to Defendant's Exhibit 1; Western Classification No. 54, Rule 11, page 249, Exhibit 4 to Defendant's Exhibit 1; Western Classification No. 55, Rule 3, page 282, Exhibit 5 to Defendant's Exhibit 1; Consolidated Freight Classification No. 1, issued by the Director General and including all carriers under Federal control, page 64, Exhibit 6 to Defendant's Exhibit 1.)

Consolidated Classification, Rule 8 (b), page 70, Section 1, being Exhibit 6 to Defendant's Exhibit 1, and Western Classification No. 55, Rule 22, page 13, Section 1, being Exhibit 5 to Defendant's Exhibit 1, provide:

"Owners are required to load into or on cars freight for forwarding by rail carriers and to unload from cars freight received by rail carriers carried at carload ratings."

Illinois Classification covering intrastate shipments in Illinois, Rule 19, provides:

"(b) Consignors and consignees will be required to load and unload all freight upon which carload ratings are applied."
(Exhibit 6 to Defendant's Exhibit 1).

All shipments involved consisted of carloads moving on carload ratings. (Stipulation of parties, Defendant's Exhibit 1, R. 240, Paragraph 44.)

Defendant's Exhibit 1 is a Stipulation of Facts in forty-six paragraphs and is printed in the record. Preamble, Paragraphs 1 to 11 both inclusive, and paragraphs 26 to 46 both inclusive, are found in Record 232 to 240, and paragraphs 12 to 25, both inclusive, are found in Record pages 296 to 299, both inclusive. The exhibits to Defendant's Exhibit 1 are not printed, but the original Exhibit 1, with all exhibits thereto, has been certified up as a part of the record.

The Uniform Livestock Contract published in the Official and Consolidated Classifications, and used by all line-haul carriers for many years provided in the receipt for the livestock as follows:

"THIS AGREEMENT * * * WITNESSETH, That the carrier has received from the shipper, subject to the classifications and the tariffs in effect, on the date of issue of this Agreement, the livestock described below in apparent good order, except as noted, consigned and destined as indicated below, *which the carrier agrees to carry to its usual place of delivery at said destination if on its road; otherwise to deliver to another carrier on the route to said destination.*" (Italics ours.)

Said contract also provides in Section 5 of Conditions that the shipper is to load and unload the livestock at his own expense. (Exhibit 3 to Defendant's Exhibit 1, pages 71 and 72; Exhibit 6 to Defendant's Exhibit 1, pages 62 and 63; Testimony Witness Mosier, Defendant's Exhibit 6, page 150 not printed in record, but original certified up as a part thereof.)

During the time the Stock Yard Company's charges were 25c for unloading and 50c for loading, the absorption tariff of the line-haul carriers permitted them to pay the full amount of the Stock Yard Company's charges, and during such time the shippers paid only the line-haul rates plus the terminal charge of $2.00, but that does not mean that the line-haul carriers held themselves out to transport the stock to the Stock Yards and unload the same for the line-haul rate, plus the terminal charge. It means that so long as the absorption tariff might remain in effect and the Stock Yard Company's charges remained the same, the shipper would have to pay no more than such rates. The fact that the amount agreed to be absorbed covered the entire charge of the Stock Yard Company furnishes the only foundation for petitioners' claim that the line-haul carriers' tariffs covered the unloading as well as the transportation of the livestock to the Stock Yards.

Petitioners repeatedly assert that the terminal charge included the loading and unloading of the livestock. Such statement is erroneous. The terminal charge was established on account of the charge the Junction Company made against the line-haul carriers for use of its rails in moving the cars, by the line-haul carriers over the Junction Company's rails to and from the Stock Yards, and also took into consideration the fact of the absorptions the line-haul carriers were making pursuant to their absorption tariffs. The trackage charge made by the Junction Company against the line-haul carriers was 75c per car each way (loaded one way

and empty the other), a total of $1.50 per car. The cost to the line-haul carriers in moving the car each way with their own locomotives and crews was a substantial amount, and in addition, the line-haul carriers were absorbing 25c for unloading and 50c for loading each car of livestock. (Testimony Witness Byers, Defendant's Exhibit 6, pages 475-6, not printed in record, but original certified up as a part thereof.)

These facts justified the *amount* of such $2.00 terminal charge, but do not show any agreement or obligation to do the unloading as such. The absorption tariff was a notice to the shippers that they would be relieved from the payment to the Stock Yard Company of its tariff rates, to the extent, however, therein specifically stated; viz., 25c per car for unloading and 50c per car for loading, and that the trunk line carriers would pay such amounts to the Stock Yard Company for its services; not that such trunk line carriers would perform the services themselves, but simply that they would pay said amounts to the Stock Yard Company for the services performed by it. The tariffs, classifications and Uniform Livestock Contract precluded the idea of any obligation to load or unload. There was no obligation on the part of the trunk lines to continue such absorptions, and if said absorption tariff had been withdrawn, the shippers would have had to pay to the Stock Yard Company the amount of its tariff rates, in addition to the road-haul rates, plus the terminal charge of $2.00 per car.

The finding of the Commission in this proceeding is exactly contrary to petitioners' contention. Such finding is:

> "In this case there are no tariff provisions requiring the line-haul carriers to make deliveries off their rails." (R. 138).

The Commission cites in support of the foregoing its earlier opinion in *Boardman & Co. v. S. P. Co.*, 37 I. C. C. 331, and states:

"In *Boardman & Co. v. S. P. Co.*, 37 I. C. C. 331, the Commission stated that in the absence of tariff provisions to the contrary, the line-haul rate of a particular carrier includes the receipt or delivery of carload freight only at industries or other points located upon its own rails." (R. 138).

It is thus seen that the record does not support petitioners' contention that the tariffs of the carriers obligated them to do the loading and unloading at their own expense or to pay the charges of the Stock Yard Company for such services, whatever they might be. On the contrary, the record affirmatively shows that the tariffs and the rates charged create no such duty, and show such contention to be entirely without foundation.

B. Petitioners ignore the fact that the Stock Yard Company was an independent common carrier holding itself out to perform the loading and unloading service on its own property devoted to public use for which it published a tariff of its charges.

C. Petitioners ignore the fact that the loading and unloading of livestock at the stock yards was a part of the transportation thereof, performed by an independent common carrier with its own employes and upon its own premises devoted to public use.

The Stock Yard Company at the suit of the Interstate Commerce Commission in 226 U. S. 286, was held to be a common carrier of livestock in the operation of its stock yards and was required to file tariffs of its charges with the Commission. The Stock Yard Company thereafter changed the form of its lease of its railroad tracks to the Junction Company, and at the time of the filing of its tariff increasing its charges and its tariff seeking to cancel its charges, was attempting to escape from the holding of the Supreme

Court, and was contending that it was no longer a common carrier. What its representatives did and said in the proceeding before the Commission must be construed with reference to such effort on its part. The Interstate Commerce Commission refused to permit it to cancel its tariffs and required same to be kept in effect during all of the time covered by this controversy. In the proceeding leading up to the award involved in this suit, the Commission in its first and second opinions, and throughout the entire proceeding, held that the Stock Yard Company was still a common carrier.

In its first opinion, the Commission after discussing the opinion of the Supreme Court holding the Stock Yard Company was a common carrier, said:

> "It is clear, therefore, that in holding the Stock Yard Company a common carrier the Court certainly had in mind the particular activities of that company with reference to shipments of livestock." (R. 128).

In the same opinion the Commission further said:

> "Upon the facts of record we find that:
> 1. The Union Stock Yard and Transit Company of Chicago is a common carrier engaged in interstate commerce and subject to the provisions of the Act to Regulate Commerce.
> 2. The notice of cancellation of its tariff of charges for loading and unloading livestock in carloads at the Chicago Stock Yards has not been justified." (R. 138-139).

In its second opinion on rehearing, the Commission adhered to such conclusion, saying:

> "We adhere to our finding that the Stock Yard Company is a common carrier engaged in interstate commerce." (R. 144).

In Paragraph 27, Defendant's Exhibit 1 (R. 236), it is stipulated that the loading and unloading of livestock was performed by employes of the Stock Yard Company, and that the unloading platforms, chutes and yards were owned by and were on the premises of the Stock Yard Company. The transportation service the Stock Yard Company performed on a shipment to the yards was the unloading and delivering to the consignee. Paragraph 3, Section 1 of the Act to Regulate Commerce provides:

> "The term 'transportation' * * * shall include * * * all services in connection with the receipt, delivery * * * storage and handling of property transported."

This Honorable Court in *Covington Stock Yards v. Keith*, 129 U. S. 126, and in *United States v. Union Stock Yards*, 226 U. S. 286, said:

> "The transportation of livestock begins with their delivery upon its cars, and ends only after the stock has been unloaded and delivered, or offered to be delivered to the consignee, if to be found at such place as admits of their being safely taken into possession."

Hence, the service of the Stock Yard Company in unloading the livestock from the cars and placing them in proper pens was a part of the through transportation and its published rates for such service constituted one of the several separate factors making up the through transportation rate from point of origin to final destination, viz., stock pens in the Stock Yards.

The Stock Yard Company, in unloading and delivering the stock to the consignee was engaged in the transportation thereof upon its own property devoted to that public use, and was entitled to reasonable compensation for the transportation service it performed, and being required to file its tariffs thereof, was entitled to collect the charge made un-

less and until found by the Commission to be unreasonable. No claim that its charge was unreasonable has been made in this proceeding.

The line-haul carriers did not join in the Stock Yard Company's tariff; nor did the Stock Yard Company join in the line-haul tariff. (Defendant's Exhibit 1, Paragraphs 5 and 6, R. 233-234; Paragraph 26, R. 235). The Stock Yard Company was therefore an independent common carrier with its own tariffs and was a connecting carrier to the line-haul railroads just as any railroad with its separate tariffs in cases of shipments beginning on one road and ending on another. The Stock Yard Company's service was a necessary one in completing the transportation and delivery to the consignee. Such transportation was necessarily done by the common carrier owning the facilities necessary thereto and furnishing the employes therefor. The line-haul carriers could not go upon said premises or perform such service any more than they could go upon the premises of another common carrier without a contract authorizing them to do so. Such a contract as between the Stock Yard Company and the line-haul carriers did not exist. Except for the absorption tariff of the line-haul carriers, the shippers would have been required to pay the entire charge of this connecting common carrier for completing such transportation.

D. Petitioners repeatedly state that the Stock Yard Company was the agent of the line-haul carriers in performing the service of loading and unloading livestock, whereas the record shows it was an independent connecting common carrier, performing its service under and pursuant to its published tariffs and without any arrangement or contract with the line-haul carriers, and without any joint tariff in respect to same.

E. Petitioners ignore the fact that the Stock Yard Company did not join or concur in the tariff of the line-haul carriers and that the line-haul carriers did not join or concur in the Stock Yard Company's tariff.

F. Petitioners ignore the testimony conclusively showing no relation of agency, either by reason of contract or tariff provisions, existed.

The Stock Yard Company in its tariff increasing its charges, effective May 21, 1917, stated:

> "The charge made by this company for the service (as a carrier's agent) of loading and unloading livestock at the Union Stock Yards, Chicago, Illinois, is as follows, etc."

The same statement is made in a supplement effective June 21, 1917.

In a supplement issued July 17, 1917, purporting to be effective September 1, 1917, but suspended by the Commission and never permitted to go into effect, and in which the Stock Yard Company sought to withdraw and cancel entirely its tariff covering its loading and unloading charges, the Stock Yard Company stated:

> "The loading and unloading platforms of the Union Stock Yards and Transit Company of Chicago will in the future be used or available for the use of the railways entering Chicago and using them as terminal stations under operating agreements."

In this supplement there is no pretension that same is filed as agent of the line-haul carriers. It does hold out an invitation to such carriers to make operating agreements, but no operating agreements were ever made, and the tariff was not permitted to become effective and was ultimately entirely withdrawn.

In no other tariff of the Stock Yard Company was there any pretension of agency. (Exhibit 1 to Defendant's Exhibit 1, original certified as a part of the record).

These tariffs of the Stock Yard Company were not concurred in by the line-haul carriers; nor did they authorize or consent to the filing thereof or acquiesce in the statements made therein. The line-haul carriers not only refused to increase their absorptions, but refused to permit the Stock Yard Company to retain the increased amount of the charges out of the line-haul carriers' revenues collected by the Stock Yard Company. To be effective as a joint tariff or to show concurrence therein by line-haul carriers, their names must appear in the tariff and each carrier must also file his assent thereto with the Commission.

Section 6, Paragraph 4, of the Act to Regulate Commerce provides:

> "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission * * *." (49 U. S. C. A., Section 6, Paragraph 4, p. 281).

In reference thereto, Witness O. T. Henkle, General Manager of the Stock Yard Company, testified that the Stock Yard Company had no authority from the line-haul carriers to increase its charges, (Defendant's Exhibit 6, page 344), and that the Stock Yard Company had no contract with the line-haul carriers (Defendant's Exhibit 6, page 354); also that the Stock Yard Company had no agreement to charge the loading and unloading to the line-haul carriers. (Defendant's Exhibit 7, page 1212).

Witness C. C. Chace, Auditor of the Stock Yard Company, testified that the Stock Yard Company did not increase its charges at the instance of the line-haul carriers

and that the charges were increased for its own benefit and it kept the benefits. (Defendant's Exhibit 6, p. 372).

Witness H. W. Byers, Freight Traffic Manager of the Chicago & North Western Railway Company, testified that the carriers did not authorize the statement in the tariff that the service would be performed "as a carrier's agent," and did not authorize such pretended agency. (Defendant's Exhibit 7, page 1260).

Witness T. D. Gohegan, Traffic Assistant to the Director General, testified that he had examined the files of the Commission and that they contained no showing that line-haul carriers had assented to or become a party to the Stock Yard Company's tariff and showed no authority from the line-haul carriers to the Stock Yard Company to state that the service performed by it in loading and unloading would be performed "as a carrier's agent." (Defendant's Exhibit 11, page 1242).

Defendant's Exhibit 6, 7 and 11 are not printed in the record, but are certified up as a part thereof.

It is fundamental that agency cannot be shown by admissions of the alleged agent. The record is barren of anything whatever to show the Stock Yard Company an agent of the line-haul carriers in respect to any transportations service performed by it. Petitioners rely for such contention entirely on such statement in the tariff, a self-serving statement on the part of the Stock Yard Company in its effort to avoid responsibility as a common carrier and to escape the requirement that it file and maintain tariffs covering its charges.

It has been conclusively adjudicated herein to be a common carrier. The plaintiffs herein resisted the effort of the Stock Yard Company to avoid responsibility as a common carrier and it was on plaintiffs' complaint such adjudication was had. Manifestly, such statement of the Stock Yard Company under such circumstances cannot establish the

Stock Yard Company to be an agent of the line-haul carriers and cannot overcome the legal effect of the Stock Yard Company being a common carrier performing a part of the transportation of the livestock on its own property devoted to public use, and pursuant to its published tariffs required to be filed, by a judgment of this Honorable Court, and which the Commission consistently refused to permit to be withdrawn or cancelled.

Surely the argument and petition based upon the contention that the Stock Yard Company was an agent of the line-haul carriers can furnish no basis for the granting of a writ of certiorari.

G. Petitioners assert that the Stock Yard Company did not collect the charges in controversy, whereas the commission found that it did so (First Opinion R. 123), the undisputed evidence so shows and petitioners in their petition in bringing this suit so allege. (R. 13).

In their petition filed in the District Court, petitioners allege that "Shippers and receivers of livestock, including plaintiffs, were compelled to and did pay the defendant, the Union Stock Yards and Transit Company * * * an amount in excess of the former tariff charges, etc." (R. 13).

In its first opinion in these proceedings the Commission found:

> "This increased charge the carriers refused to pay with the result that * * * the Stock Yard Company collected and retained such charges from the shippers." (R. 123).

The testimony in behalf of all of the plaintiffs was that the charges complained of were paid to the Stock Yard Company by checks naming it as Payee. The freight bills of the line-haul carriers after a controversy between them and

the Stock Yard Company, were made out showing the line-haul carriers' charges and an additional item of 25c, stated therein to be for unloading, and stating that same was assessed pursuant to the Stock Yard Company's tariff, referring to it therein by appropriate tariff reference. (Witness Byers, Defendant's Exhibit 6, pages 472-476, 496-498 and 504-512; printed excerpts, pages 37-43).

The freight bill was thus a composite bill containing the charges of the initial and delivering carriers, the charge of each being separately stated. True, when collected, the entire amount was turned over to the line-haul carriers weekly, and monthly bills for the portion of the Stock Yard Company's charges collected from the shippers and the portion covered by the line-haul carriers' absorption tariffs were rendered by the Stock Yard Company and paid by the line-haul carriers. This was merely for convenience in bookkeeping and in harmony with the practice theretofore in effect for the Stock Yard Company to render monthly bills for its charges covered by the absorption tariffs of the line-haul carriers before the Stock Yard Company increased its charges and precipitated the controversy with the line-haul carriers and the shippers.

The testimony with regard to the methods of collection was before the Commission and was the basis of its finding that the Stock Yard Company collected and retained the charges. This testimony was in the record before the Circuit Court of Appeals and is the basis of its conclusion that while the method was somewhat circuitous, still the evidence showed the Stock Yard Company collected and retained the charge in controversy. This charge was collected from the shippers because of the Stock Yard Company's tariff.

Mr. Henkle, General Manager of the Stock Yard Company, testified that if the Commission would permit the Stock Yard Company to cancel its tariff containing the

charge complained of, the Stock Yard Company would cease collecting same from the shipper. (Defendant's Exhibit 6, page 342, not printed in record, but original certified up to this Court as a part thereof).

C. C. Chace, Auditor of the Stock Yard Company, who made the collections, testified:

> "Q. Do you know under what authority the loading and unloading charges were collected or assessed?
> A. On the authority of the Stock Yards tariff."
> (Defendant's Exhibit 9, page 181, not printed in record, but original certified up to this Court as a part thereof.)

The testimony in behalf of the plaintiffs showed conclusively that the charges were paid to the Stock Yards Company by the commission men as agents of the shippers and with the shippers' own funds, the amount being taken out of the proceeds of the sales before remitting to the shippers. (See illustrative testimony Witness Gillogly, Defendant's Exhibit 9, page 277; Witness Wilson, Defendant's Exhibit 9, pages 363 and 364).

H. The charge of the Stock Yard Company was limited to the service of loading and unloading.

Petition for certiorari, pages 5 and 6, asserts that the charge made by the Stock Yard Company included payment for its services in collecting the line-haul carriers' freight charges and certain other services of a non-common carrier character. This matter is not argued or referred to in the brief. In respect thereto, we merely desire to point out that the tariff of the Stock Yard Company expressly limits the charge to loading and unloading. The tariff makes a charge for weighing in some cases. For the other services performed by the Stock Yard Company, no charge is made.

They are not transportation services and the Stock Yard Company, in complying with the judgment of the Supreme Court of the United States and the requirements of the Commission, was not required to file tariffs therefor and did not do so. They were services performed in consideration of the benefit to the Stock Yard Company in conducting its great public market of the prompt release of the livestock without payment of charges, surrender of bill of lading, and the like. In consideration of such prompt release, the Stock Yard Company guaranteed the collection of the charges and the delivery to the right consignee, and in protecting its guaranty, counted the stock, checked its condition and collected the charges.

Such duties were, however, in actual practice substantially limited to the inbound shipments for unloading, for which it charged a lower amount than for loading. Notwithstanding in outbound shipments there was no collection of charges, no guaranty of collection or delivery to the right party, the Stock Yard Company charged a higher rate. If evidence was competent to show the charge made in the tariff covered something not indicated therein, such facts would be conclusive that only loading and unloading services were involved.

As pointed out in petitioners' brief at pages 11 and 12, even if the services of collecting charges, guaranteeing delivery, counting and checking the stock, were transportation services, there was no obligation on the part of the Stock Yard Company to make a charge therefor, and since its tariff filed made no charge it would seem to be conclusive that the charge of the Stock Yard Company did not include such services, but included only the loading and unloading service.

In support of the suggestion that there was no obligation to make a charge, petitioners cite *Interstate Commerce Commission v. Stickney*, 215 U. S. 98-105, which so holds.

II.

COMMON CARRIERS ENGAGED IN INTERSTATE COMMERCE ARE REQUIRED TO FILE TARIFFS OF THEIR CHARGES WITH THE INTERSTATE COMMERCE COMMISSION AND TO MAINTAIN AND ENFORCE THE SAME.

The duty to file tariffs covering all charges made by a common carrier engaged in interstate commerce is established by the express mandate of the statute. (Act to Regulate Commerce, Section 1, Paragraphs 3 and 6; Section 6, Paragraphs 1 and 7; Appendix 47-49). Such statutes require the filing of tariffs of rates and also require the carriers to "establish" and "enforce" classifications "with reference to such rates, tariffs, regulations, practices, etc." The duty to enforce tariff provisions, including classification provisions, has been repeatedly emphasized by the courts and by the Commission. A duly published tariff has the effect of law, and all shippers are presumed to know of the tariff and classification provisions.

In *Louisville & Nashville Railway Co. v. Maxwell*, 237 U. S. 94-98, this Honorable Court announced the rule as follows:

> "Under the Interstate Commerce Act the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it and they, as well as the carrier, must abide by it unless it is found by the Commission to be unreasonable."

In *Keogh v. Chicago & North Western Railway Co.*, 260 U. S. 156-163, it is said:

> "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff, un-

less and until suspended or set aside. This rate is made for all purposes the legal rate as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier."

In *Louisville & Nashville Railway Co. v. Central Iron Works*, 265 U. S. 59-65, it is said:

"The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charge legally payable was determined by applying this tariff rate to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

In *Davis v. Henderson*, 266 U. S. 92-93, this doctrine was applied to a tariff rule requiring the ordering of cars to be in writing. In upholding the rule, the court said:

"There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of a common carrier under published tariffs."

It follows that the Stock Yard Company, being a common carrier in interstate commerce, was forced by judgment of this Honorable Court and requirements of the Commission to file tariffs of its charges. It was bound to collect such charges from the party benefited by the service it rendered and for which the charges were made, unless by tariffs legally filed and published, the line-haul carriers were authorized to absorb all or a part thereof. To the extent

the charges were not absorbed by line-haul carriers, the Stock Yard Company was bound to collect from the shipper for whom the service was rendered.

Petitioners say there is no showing that the Stock Yard Company's tariffs were filed in the stations of the line-haul carriers. We suggest there is no showing to the contrary, but more in point, there was no necessity under the statute for doing so. Section 6, Paragraph 1, of the Act to Regulate Commerce, requires the carrier to keep its own tariffs on file in its stations and offices, but makes no requirement that it keep on file the tariffs of connecting carriers in which it has not joined. The filing of the tariffs of the Stock Yard Company with the Interstate Commerce Commission was of itself notice to all shippers of its provisions. Such filing gave the Stock Yard Company's tariffs the force and effect of law. The filing of the absorption tariffs with the Commission gave them the force and effect of law. All shippers were bound to know the provisions of the Stock Yard Company's tariffs and the provisions of the absorption tariff and to know there was a 25c charge for the service rendered them by the Stock Yard Company, which was not covered by the absorption tariffs and which they, therefore, were required to pay.

The opinion of the Circuit Court of Appeals is in accordance with the foregoing announcements of this Honorable Court and is based upon applicable facts.

III.

THE APPLICABLE TARIFFS WERE PLAIN AND UNAMBIGUOUS. NO ADMINISTRATIVE FUNCTION OF THE COMMISSION WAS INVOLVED AND THE CIRCUIT COURT OF APPEALS DID NOT INFRINGE UPON ANY JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.

The Court in reaching its conclusion that the charges were lawfully collected by the Stock Yard Company relied upon the fact that it was a common carrier, had been forced to file its tariffs and was bound to enforce them, and upon the tariffs and classifications governing the transportation and the services involved. The Stock Yard Company's tariff is as simple as words could make it. The only charge contained therein is for loading and unloading, and clearly states the amount of such charges. The absorption tariff of the line-haul carriers is equally simple and states that the line-haul carriers will pay to the Stock Yard Company 25c for unloading and 50c for loading each car of livestock. The classifications offered in evidence are likewise equally simple. The question of the reasonableness of the Stock Yard Company's charges was not presented; the question of whether or not the line-haul carriers should absorb a greater amount, than their absorption tariffs provided for, was not involved. The Commission did not find the provisions of either tariff were unreasonable or unlawful. The Commission found, notwithstanding the tariff provisions, that the "collection of separate charges from the shippers for unloading or loading in addition to the rates on livestock from and to interstate points to and from the Stock Yards was an unlawful and unreasonable practice." (R. 144-145).

This finding was a conclusion of law and not an exercise of any administrative function. The Circuit Court of

Appeals construed the plain provisions of the tariffs which we have seen determine the legal rate and reached a different conclusion from that announced by the Commission. The Circuit Court of Appeals in effect said that because of the tariff provisions, the collection of the additional amount was not an unlawful practice. The question was a judicial, not an administrative one. It was the determination of the legal status created by published tariffs. That Courts have abundant authority to determine such matter has been repeatedly held by this Honorable Court. Such was the case of *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U. S. 285-294, where the Court said:

> "Here no fact evidential or ultimate is in controversy and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of the words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction and preliminary resort to the Commission was therefore unnecessary."

In *Interstate Commerce Commission v. Louisville & Nashville Railway Co.*, 227 U. S. 88-91, it is said:

> "But the legal effect of evidence is a question of law."

The evidence was undisputed; the tariffs contain ordinary words used in their ordinary sense, and it was the province and duty of the Court to determine the legal effect of them.

The Commission, instead of exercising an administrative function in finding that the collection of the separate charge was an unlawful practice, exercised a judicial one. Its judicial conclusion was contrary to that of this Honorable Court in *Interstate Commerce v. Stickney*, 215 U. S. 98-104, where

the $2.00 terminal charge was directly attacked as a separate charge and upheld by the Court. Such conclusion is contrary to Paragraph 1 of Section 6 of the Act to Regulate Commerce, which requires that the carrier "shall also state separately all terminal charges, etc." and is contrary to the duty of the Stock Yard Company, a common carrier required to publish its tariffs and entitled to compensation for the only service of transportation for which it made a charge. There was no infringement in the opinion of the Circuit Court of Appeals upon the jurisdiction of the Commission. The Court merely determined the "legal effect of evidence", which was undisputed.

IV.

THE ABSORPTION TARIFFS OF THE LINE-HAUL CARRIERS LIMITED AND MEASURED THEIR LEGAL RIGHT AND OBLIGATION TO CONTRIBUTE TO THE PAYMENT OF THE STOCK YARD COMPANY'S CHARGES.

What has been said in reference to the duty to file tariffs and the binding effect thereof is equally applicable here. Paragraph 7 of Section 6 of the Act to Regulate Commerce provides that no carrier shall engage or participate in transportation unless its rates have been filed with the Commission, and forbids a departure from the rates when filed, and further provides:

> "Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The absorption of any part of the charge of another carrier constitutes a concession to the shipper. The concession

can be made only by filing a tariff specifying same. The tariff defines and limits the amount of such concession. The line-haul carrier cannot absorb more than the amount designated in the tariff filed. The line-haul carriers refused to amend their tariffs to permit of absorbing the increased charge of the Stock Yard Company, and refused to violate their tariffs by paying more than the tariffs provided. The question of whether they should have done so was presented, but the Commission expressly found:

> "The record is not sufficient to enable us to reach a judgment as to what portion of the loading and unloading charge at the Chicago Stock Yards should be absorbed by the line-haul carriers." (R. 136).

How then, could the line-haul carriers be held liable for refusing to pay the increased charge to the Stock Yard Company, and how could the collection of such charge by the Stock Yard Company, in pursuance of its published tariff, which it was not permitted to withdraw, create a liability on the Director General, who was operating the line-haul carriers?

V.

THE INTERSTATE COMMERCE COMMISSION COULD NOT FIND THE REFUSAL OF THE CARRIERS TO ABSORB THE INCREASED CHARGE OF THE STOCK YARD COMPANY WAS UNREASONABLE OR REQUIRE THE ABSORPTION OF THE SAME WITHOUT EVIDENCE SHOWING THE LINE-HAUL RATE, PLUS THE TERMINAL CHARGE, WAS SO HIGH AS TO BE UNREASONABLE, UNLESS THE INCREASED CHARGE SHOULD BE INCLUDED IN THE ABSORPTIONS PROVIDED FOR, NOR WITHOUT EVIDENCE AND A FINDING THAT A FAILURE TO ABSORB SUCH INCREASED CHARGE WOULD RESULT IN DISCRIMINATION.

No issue was presented as to the reasonableness of the line-haul rate or the $2.00 terminal charge, nor as to the reasonableness of the charge of the line-haul carriers as a whole, and no evidence was presented thereon. The fact that rates had been raised from time to time furnishes no basis for suggesting that absorptions should have been increased. The evidence does not show such increases and they are suggested for the first time by petitioners in their petition and brief filed in this Court. We assume, however, they are matters of which the Court may take judicial notice, just as it will take judicial notice of the guaranty to carriers contained in the Transportation Act of 1920 for a period of six monhs after Federal control ended, and the increase in rates to the carriers granted by the Commission, pursuant to the mandate in the Transportation Act, in its proceeding known as *Ex Parte* 73, such increase being effective September 1, 1920, and ranging from 25% to 40% over existing rates at the end of Federal control, and that such increases applied to livestock rates. Such increases in rates mentioned by petitioners and as made in *Ex Parte* 73 prove nothing and have no place in this proceeding. The fact remains that the

carriers could not be required to increase their absorptions without an issue and evidence showing that in view of the rates they were collecting, they should be required to do so. Such matter would involve a finding that the rates being collected were unreasonably high, unless the additional charge should be absorbed. See *Baltimore & Ohio R. R. Co. v. United States*, 277 U. S. 291, 301-2.

The Commission would also be obliged to find that discrimination would otherwise result in order to require the additional absorptions. The Commission so held in *Wells Paper Co. v. P. R. R. Co.*, 62 I. C. C. 705-708 and *Hunt Ferris & Co. v. Chicago & North Western Railway Co.*, 68 I. C. C. 283-4, and in many other cases.

The Commission in these proceedings expressly found the evidence did not show discrimination in respect to the absorptions, (R. 135-136), and also that the evidence was insufficient to show the amount of the loading and unloading charges the carriers should absorb. (R. 136). The Commission, therefore, did not attempt or intend to authorize or require an increase in the absorptions or an amendment of the line-haul carriers' absorption tariffs. It attempted to exercise a judicial—not an administrative function—and its judicial conclusions are subject to review by the Courts.

VI.

THE APPEAL TO THE CIRCUIT COURT OF APPEALS WAS FROM THE JUDGMENT ENTERED IN THE DISTRICT COURT, AND NOT FROM THE REASONS THEREFOR ANNOUNCED BY THE DISTRICT JUDGE, AND SINCE THE CIRCUIT COURT OF APPEALS BASED ITS JUDGMENT OF AFFIRMANCE ON AN ENTIRELY DIFFERENT GROUND, THE REASONS ANNOUNCED BY THE DISTRICT JUDGE MAY NOT BE CONSIDERED IN DETERMINING WHETHER PETITION FOR CERTIORARI SHOULD BE GRANTED.

The District Judge, in directing a verdict and in entering judgment for respondents, relied on the conclusion that the petitioners were not the parties who bore the charges complained of, and did not have such interest as would entitle them to maintain the suit. The District Judge did not pass upon the other defenses presented by respondents. The Circuit Court of Appeals refused to adopt the reasons expressed by the District Judge and based its judgment of affirmance on another defense presented by respondents. (R. 135-136).

The jurisdiction of this Honorable Court to review by certiorari a case of this character does not extend to judgments of a District Court. The jurisdiction to review by certiorari decisions of Federal Courts is found in Title 28, U. S. C. A. Section 347, and is limited to Circuit Courts of Appeal and Court of Appeal of the District of Columbia. Since the Circuit Court of Appeals did not determine whether petitioners have such interest as will entitle them to maintain the suit, its judgment cannot be reviewed by certiorari in respect to that question. Its judgment, if reviewed at all, must be in reference to the grounds upon which it determined the

case. The reasons moving the District Judge can therefore furnish no basis for granting the writ.

VII.

NO QUESTION OF PUBLIC IMPORTANCE OR OTHER QUESTION ON ACCOUNT OF WHICH A WRIT OF CERTIORARI SHOULD BE GRANTED, IS PRESENTED.

The object of this suit is to recover certain moneys, collected from in excess of 174,000 shippers, through the petitioners as agents of the shippers, and paid from the shippers' funds. Petitioners now ask this Court to review the decision of the Circuit Court of Appeals which decided adversely to them. However important pecuniarily such decision may be to these petitioners, it would not appear to involve any question of public interest and general importance, and certainly no conflict between the decisions of State and Federal Courts, or between Circuit Courts of Appeal of different circuits, and therefore is not of the character which under the statutes, decisions and rules of this Court authorize or justify the granting of the writ of certiorari. No principle or precedent to govern future shipments is involved, since Congress in enacting the Transportation Act 1920 amended Section 15 of the Act to Regulate Commerce by requiring the line-haul carriers to pay the loading and unloading charges on all shipments of livestock of the character involved, delivered at or received from public markets, and all line-haul carriers have so amended their tariffs as to comply therewith.

The reasons suggested in the petition for certiorari for granting the writ, and in the errors assigned in the brief, assume facts not shown in the record, and ignore facts shown therein, as we have pointed out in Division I of our Argument, and suggest questions which were not decided or determined by the Circuit Court of Appeals and which do not

inhere in its judgment. The decision of the Circuit Court of Appeals, when considered in light of the real facts presented and considered by that Court, presents merely a question of whether a legal liability existed on the part of respondents to repay the charges collected by the Stock Yard Company. Such question is merely one between the parties in interest, is not a matter of public interest, and since a writ of certiorari will not be granted merely to review the correctness of the judgment of the Circuit Court of Appeals, no ground for granting the writ is presented.

The language used by this Court in the case of *Magnum Import Co. v. Coty*, 262 U. S. 159, 163, is very appropriate to the case at bar, viz.:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first, to secure uniformity of decision between those courts in the nine circuits, and, second, to bring up cases involving questions of importance, which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

For lack of sufficient reasons, we submit that the application for a writ of certiorari should be denied.

Respectfully submitted,

SIDNEY F. ANDREWS,

A. A. MCLAUGHLIN,

Counsel for Respondent Andrew W. Mellon, Director General of Railroads.

APPENDIX.

Act to Regulate Commerce

Section 1.

(3) *Definitions.* The term 'common carrier' as used in this chapter shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier'. The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term 'transmission' as used in this chapter shall include the transmissions of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalties and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

(6) *Classification of property for transportation; regulations and practices.* It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of prop-

erty for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Section 6.

(1) *Schedule of rates, fares, and charges; filing and posting.* Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other chrges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every

depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such forms that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

(4) *Joint tariffs.* The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

(7) *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares and charges upon which the same are transported by said carrier, have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

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MAR 23 1932

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, Copartners trading as ADAMS & KITCHEN, et al., *Petitioners,*

vs.

ANDREW W. MELLON, Director General of Railroads, and UNION STOCK YARD & TRANSIT COMPANY, *Respondents.*

BRIEF OF RESPONDENT DIRECTOR GENERAL OF RAILROADS ON THE MERITS.

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SUBJECT INDEX.

Page

I. STATEMENT OF THE CASE 1
II. SUMMARY OF ARGUMENT 30
III. ARGUMENT 40
Point I. Fundamental misconception of petitioners as to the facts 40
A. The published tariffs of the line-hall carriers covered transportation to the stock yards but did not include unloading the stock 40
B. The Yard Company was not the agent of the line-hall carriers in performing any transportation service or in publishing and enforcing its tariffs 51
C. No matter of administrative discretion was involved in the decision of the Interstate Commerce Commission 54
Point II. The evidence was insufficient to show the duty of loading and unloading live stock at the stock yards was that of the line-haul carriers, or that the line-haul carriers should assume the expense thereof 60
Point III. The stock yards were not the terminals of the line-haul carriers 65
Point IV. The Yard Company was a common carrier subject to the jurisdiction of the Interstate Commerce Commission and its tariffs prescribing charges for its transportation services furnish the legal return therefor which it was bound to collect 66
Loading and unloading was a transportation service for which the carrier performing the service is entitled to compensation and for which the shipper was bound to pay 68
Point V. The increased charge of 25 cents per car was collected from the shipper by the Yard Company, and the Circuit Court of Appeals correctly so held 72
Point VI. The making and collecting of a separate charge for the service of the Yard Company in loading and unloading the live stock was not an unlawful or unreasonable practice, and such finding of the Commission is without support in the evidence, and is contrary to the evidence and also contrary to law 74
Point VII. Neither the efforts of the Yard Company to force the line-haul carriers to pay its increased charge by inserting in parentheses in its tariffs "as the carrier's agent," nor its alleged admissions can create an obligation on the line-haul carriers to pay such charge, or create a liability on their part for the collection of such charges by the Yard Company 81

Page

Point VIII. Congress did not consent that the agent appointed by the President might be proceeded against before the Interstate Commerce Commission for a tort, but only for damage resulting from the "collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, regulations and practices" 85

Point IX. The absorption tariffs of the line-haul carriers furnished the measure of their obligation and legal right to contribute to the payment of the Yard Company's charges 90

Point X. The decision of the District Court that these petitioners had no right to maintain this action was correct 93

Only error which may have resulted in prejudice can justify reversal of a judgment 100

The party entitled to recover reparation is the one who paid and bore the charges on account of which recovery is sought, and who has been damaged thereby 101

The order of the Commission in this case is based upon a prior holding of the Commission in the case of Missouri Portland Cement Co. vs. Director General of Railroads, 88 I. C. C. 492 (opinion of District Court; R. 68) 104

Brief filed on behalf of the Interstate Commerce Commission as amicus curiae 120

Point XI. No question of public importance or other question justifying the writ of certiorari is presented, and it must now appear that the writ in this case was improvidently created and should be dismissed 126

TABLE OF CASES CITED.

Pages

Adams and Kitchen vs. Mellon, et al, 39 Fed. (2d) 80, D. C. E. D. Illinois 94, 105, 112

Adams and Kitchen vs. Mellon, et al., 51 Fed. (2d) 620, C. C. A. 7th Circuit 37

Anadarko Cotton Oil Co. vs. A. T. & S. F. Ry. Co., 20 I. C. C. 43 103

Baer vs. D. & R. G. Ry. Co., 233 U. S. 479 103

Burgess, et al., vs. Transcontinental Freight Bureau, 13 I. C. C. 668 110, 112

Camp vs. Gress, 250 U. S. 308-317 ..... 38, 100

Chicago Junction Case, 264 U. S. 258-263 ..... 31, 57

Chicago Live Stock Exchange vs. A. T. & S. F. Ry. Co., et al., 52 I. C. C. 209 33

Chicago Live Stock Exchange vs. A. T. & S. F. Ry. Co., et al., 58 I. C. C. 164 33

Chicago Live Stock Exchange vs. A. T. & S. F. Ry. Co., et al., 100 I. C. C. 266-270 98

C. M. & St. P. Ry. Co. vs. Wisconsin, 238 U. S. 491 ..... 33, 69

C. R. I. & P. Ry. Co. vs. United States, 274 U. S. 29-33 ..... 31, 57

Covington Stock Yards Co. vs. Keith, 139 U. S. 128-136 ..... 33, 68, 69, 77

Crutchfield & Woolfolk vs. Southern Pacific Ry. Co., 24 I. C. C. 679 120

Davis Agent vs. Donovan, 265 U. S. 257-263 ..... 36, 86

Darnell Tanzer Lumber Co. vs. Southern Pacific Ry. Co., 190 Fed. 659 110

Darnell Tanzer Lumber Co. vs. Southern Pacific Ry. Co., 221 Fed. 890 ..... 110, 125

Darnell Tanzer Lumber Co. vs. Southern Pacific Ry. Co., 229 Fed. 1022 112

Darnell Tanzer Lumber Co. vs. Southern Pacific Ry. Co., 245 U. S. 531 39

General Grinding Wheel Corp. vs. Southern Railway Co., et al., 169 I. C. C. 83-91 116

Great Northern Ry. Co. vs. Merchant's Elevator Co., 259 U. S. 285-294 ..... 31, 55

Illinois Central Ry. Co. vs. Vest, et al., 39 Fed. (2d) 658-660, D. C. Ky. 39, 115

Interstate Commerce Commission vs. C. B. & Q. R. R. Co., 186 U. S. 320 ..... 31, 35, 47, 58, 76

Interstate Commerce Commission vs. Louisville & Nashville Ry. Co., 227 U. S. 88-91-92 ..... 31, 56, 57

Interstate Commerce Commission vs. Stickney, 215 U. S. 98-104-105 35, 77

Interstate Commerce Commission vs. Union Pacific R. R. Co., 222 U. S. 541-2 ..... 31, 57

Keogh vs. C. & N. W. Ry. Co., 260 U. S. 156-163 ..... 33, 68

Knudson vs. Michigan Central Ry. Co., 148 Fed. 968-974, C. C. A. 8th Circuit 104

Pages

Layne & Company vs. Western Well Works, et al., 261 U. S. 387-393 39, 127
Lehigh Valley R. R. Co. vs. Meeker, 211 Fed. 785, C. C. A. 3rd Circuit 38, 103
Louisville & Nashville Ry. Co. vs. Central Iron Works, 265 U. S. 59-65 ..... 33, 68
Louisville & Nashville Ry. Co. vs. Maxwell, 237 U. S. 94-97-98 ..... 33, 68
Louisville & Nashville Ry. Co. vs. Sloss-Shefield Iron Co., 60 I. C. C. 595 ..... 39, 113
Louisville & Nashville Ry. Co. vs. Sloss-Shefield Iron Co., 295 Fed. 57-8, C. C. A. 6th Circuit 114
Louisville & Nashville Ry. Co. vs. Sloss-Shefield Iron Co., 269 U. S. 217 ..... 39, 113
Magnum Import Co. vs. Coty, 262 U. S. 159-163 ..... 39, 128
Meeker vs. Lehigh Valley R. R. Co., 236 U. S. 412-428 ..... 31, 57, 103
Mills vs. Lehigh Valley R. R. Co., 238 U. S. 473-81-82 103
Missouri Portland Cement Co. vs. Director General, 88 I. C. C. 492 ..... 38, 94, 97, 106
Nicola, et al. vs. Louisville & Nashville Ry. Co., 14 I. C. C. 199-208 111
North American Co. vs. St. Louis, S. F. Ry. Co., D. C. E. D. Missouri (Appendix 133) 121
Pan-Handle & S. F. Ry. Co. vs. Phillips, 197 S. W. 1031, Texas 71
Pan-Handle & S. F. Ry. Co. vs. Crawford, 198 S. W. 1079, Texas 71
Parsons vs. C. & N. W. Ry. Co., 167 U. S. 447-460 ..... 38, 102
Pennsylvania Ry. Co. vs. International Coal Co., 230 U. S. 184-200 ..... 38, 102, 103
Southern Pine Lumber Co., 14 I. C. C. 195-7 101
Spiller vs. A. T. & S. F. Ry. Co., 253 U. S. 117-135 ..... 38, 102
Union Trust Co. vs. A. T. & S. F. Ry. Co., 64 Fed. 992, D. C. E. D. Ill. 77
United States Navigation Co vs. Cunard S. S. Co., 32 Sup. Ct. Rep. 247-249 ..... 31, 55
United States vs. Union Stock Yards & Transit Co., 226 U. S. 286 ..... 30, 33, 40, 51, 67, 69
Y. & M. V. Ry. Co. vs. Mullins, 249 U. S. 531-532-3 ..... 38, 100

TABLE OF STATUTES CITED.

Pages

Act to Regulate Commerce, Section 1, Paragraph 3, 49 U. S. C. A., Section 1, Paragraph 3, Page 11 ..... 33, 68

Act to Regulate Commerce, Section 1, Paragraph 6, 49 U. S. C. A., Section 1, Paragraph 6, Page 12, (Appendix 130) 32, 36, 64, 90

Act to Regulate Commerce, Section 6, Paragraph 1, 49 U. S. C. A., Section 6, Paragraph 1, Page 240-241, (Appendix 130) 31, 35, 59, 76

Act to Regulate Commerce, Section 6, Paragraph 4, 49 U. S. C. A., Section 6, Paragraph 4, Page 281, (Appendix 131) 30, 35, 85

Act to Regulate Commerce, Section 6, Paragraph 7, 49 U. S. C. A., Section 6, Paragraph 7, Page 283, (Appendix 131) 35, 36, 90

Act to Regulate Commerce, Section 8, 49 U. S. C. A., Section 8, Pages 316-317, (Appendix 132) 101

Act to Regulate Commerce, Section 15, Paragraph 5, 49 U. S. C. A., Section 15, Paragraph 5, Page 426, (Appendix 132) 32, 61

Act to Regulate Commerce, Section 16, Paragraph 2, 49 U. S. C. A., Section 16, Paragraph 2, Page 7 101

Transportation Act, 1920, Section 206a, 49 U. S. C. A., Section 74, Paragraph A, Page 357 86

Transportation Act, 1920, Section 206c, 49 U. S. C. A., Section 74, Paragraph C, Page 357, (Appendix 132) 36, 87

IN THE

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No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, Copartners trading as ADAMS & KITCHEN, et al., *Petitioners,*

vs.

ANDREW W. MELLON, Director General of Railroads, and UNION STOCK YARD & TRANSIT COMPANY, *Respondents.*

BRIEF OF RESPONDENT DIRECTOR GENERAL OF RAILROADS ON THE MERITS.

STATEMENT OF THE CASE.

Petitioners' statement of facts omits many essential facts and is, in some respects, misleading and erroneous. We believe the Court will be aided by a complete statement of the material facts rather than attempting to dovetail into petitioners' statement of facts, omitted facts and corrections of errors therein. We accordingly adopt such course. For brevity and convenience, respondents will be referred to herein as "Director General" and "Yard Company," respectively.

The Yard Company was created by special Act of the Legislature of Illinois, approved February 13, 1865, and was

empowered to construct necessary buildings, railroad tracks, loading and unloading platforms, for the accommodation of the business of a general Union Stock Yards, and to construct, maintain and operate a railway for its yards to connect with the tracks of all railroads terminating in Chicago. (R. 123-124). The shares in the Yard Company were owned by the railroads terminating in Chicago until 1894, at which time the railroads divested themselves thereof. During such period no charges were made for the use of the tracks in reaching the yards with trains of the line-haul carriers. After the line-haul carriers disposed of their shares, the Yard Company made a trackage charge against the railroads for use of its tracks, which was assessed upon a per car basis in the sum of 75c per car each way, loaded in and empty out. (Defendant's Exhibit 6, pages 475-6, not printed in the record, but original certified to this Court).

Subsequent to the assessment of such charge, the line-haul carriers continued to receive and deliver shipments of livestock in carloads at the Stock Yards, transporting them with their own locomotives and crews, and continued to absorb the loading and unloading charges, and soon after the assessment of such trackage charge, published their tariffs containing a terminal charge of $2.00 per car for the service of moving cars between the Stock Yards and points on their lines. This increased the total rate for transporting livestock between points of origin and the Stock Yards $2.00 per car. This $2.00 charge was assailed by the shippers and was held unreasonable by the Interstate Commerce Commission, but the Commission's conclusion was overruled and the charge upheld in *Interstate Commerce Commission vs. C. B. & Q. R. R. Co.*, 186 U. S. 320 (R. 124-125).

A full history of the organization and development of the Yard Company up to 1894 is contained in the opinion of the Court in that case. The Yard Company from the beginning performed the service of loading and unloading all livestock

at the yards and in 1867 established a charge of 50c per car for loading and 25c per car for unloading, which charge continued in effect until May 21, 1917. (R. 122-124).

In 1897 the Yard Company leased all of its railroad property to the Chicago Junction Railway Company, (hereinafter referred to as "Junction Company") for a period of fifty years in consideration of a share of the net profits, the Yard Company retaining to itself the loading and unloading platforms and yards which it continued to operate, and the Junction Company thereafter operated the railroad property. (R. 124). In 1911 an action was brought by the Interstate Commerce Commission in the Commerce Court to compel the Yard Company and the Junction Company to file tariffs with the Interstate Commerce Commission covering their charges, in conformity with Section 6 of the Act to Regulate Commerce. The case went to the Supreme Court of the United States, where the contention of the Commission was upheld in 226 U. S. 286, and the Junction Company and the Yard Company were each held to be a common carrier and required to file tariffs with the Commission. (R. 125-126). In compliance with such decision, the Yard Company filed its tariffs with the Commission showing its charges for loading and unloading livestock. (R. 127).

The decision of the Supreme Court was rendered December 9, 1912. The tariff of the Yard Company was filed with the Commission May 1, 1913, and certified copy thereof is attached to Exhibit 1 to Defendant's Exhibit 1, a stipulation of facts signed by the parties, with various exhibits thereto, the stipulation being printed in the record, but the exhibits with the original stipulation (Defendant's Exhibit 1), certified to this Court and now a part of the record herein. (R. 233, Paragraphs 1 and 2).

Subsequent to the filing of its tariff by the Yard Company, the lease with the Junction Company was cancelled and a new lease entered into, pursuant to which the Yard Com-

pany received a fixed rental for its property instead of a share of the net profits. The line-haul carriers filed tariffs covering their terminal charges, which included a provision that the line-haul carriers would absorb charges of the Yard Company in the sum of 50c for loading and 25c for unloading each car of live stock received from or transported to the yards. This is known as the Lowery Tariff, which covered terminal charges in the Chicago District, including switching charges and various other terminal charges. (R. 223-225 and Exhibit 2 to Defendant's Exhibit 1).

The language of the absorption tariff in reference to the loading and unloading charge is:

"CARRIERS AS SHOWN WILL PAY THE UNION STOCK YARDS AND TRANSIT COMPANY'S CHARGES AS FOLLOWS:

Loading	Unloading
In cents per car	In cents per car
50	25 "

By tariffs filed with the Interstate Commerce Commission effective May 21, 1917, the Yard Company increased its loading and unloading charges 25c per car, making its charges for such services thereafter 75c per car for loading and 50c per car for unloading. The line-haul carriers refused to pay the increased charges and did not amend their tariffs, but continued their absorptions under tariffs theretofore in effect and continued in effect. (R. 122-123).

The line-haul carriers were not a party to the Yard Company's tariff and did not authorize or consent to the filing thereof. On the title page of such tariff, however, is the following:

> "The charge made by this company for the service (as a carrier's agent) of loading and unloading livestock at the Union Stock Yards at Chicago, Illinois, is as follows, etc."

Then follows the charge of 50c per car for unloading and 75c per car for loading. The tariff originally filed in obedience to the decisions of the Supreme Court of the United States did not contain in parentheses or otherwise, the words "as a carrier's agent," or any other words of agency. The language of that tariff was:

> "The charge made by this company for the service of loading and unloading livestock is as follows: For loading, 50c per car of any capacity; for unloading, 25c per car of any capacity."

See first sheet of Exhibit 1 to Defendant's Exhibit 1.

The Yard Company had no authority from the line-haul carriers to file said tariff as their agent or otherwise. (Testimony Henkle, General Manager Yard Company, Defendant's Exhibit 6, page 344, original certified to this Court). Nor was such tariff filed at instance of the line-haul carriers. (Testimony Chace, Auditor Yard Company, Defendant's Exhibit 6, page 372; testimony Byers, Freight Traffic Manager, C. & N. W. Railway Co., Defendant's Exhibit 7, page 1260, original certified to this Court).

The files of the Interstate Commerce Commission show no authority for the statement "as carrier's agent." (Testimony Gohegan, Defendant's Exhibit 11, page 1242, original certified to this Court).

The Yard Company attempted to force the line-haul carriers to absorb the additional charge, but they refused to do so. The Yard Company had for many years been collecting the freight charges of the line-haul carriers and for a time withheld the additional charge out of the freight charges of the carriers collected by it. The line-haul carriers, to avoid

such practice, were preparing to collect their own charges, when an arrangement was reached by which in making out the freight bill, the additional 25c was added thereto, the bill reciting that it was assessed under the Yard Company's tariff for its charge in addition to that covered by the line-haul carriers' absorptions. (Defendant's Exhibit 6, 490-497). As thus prepared, the increased charge of 25c was collected by the Yard Company from the commission men, who were the consignees of the shipments. (R. 122-123).

It is usual for the terminal carrier to collect the charges of the line-haul carrier. For such service no compensation is received. The Stock Yard Company had for many years collected the charges of the line-haul carriers, pursuant to such practice and in consideration of prompt release of the live stock without surrender of bill of lading and without payment of charges,—guaranteed such charges. Without such prompt release, its live stock market could not be successfully operated. (Defendant's Exhibit 6, pages 498 and 499).

The understanding between the Yard Company and the line-haul carriers with reference to placing the additional charge of the Yard Company on the expense bills, was in keeping with the custom and practice in the Chicago District for line-haul carriers in making out their bills to show thereon the charges of the terminal or switching carrier, notwithstanding the terminal carriers' service was performed subsequent to that of the line-haul carriers. Such practice was based upon the advantage of having the total charge against the consignee presented and collected in one bill. (Defendant's Exhibit 6, pages 538 and 539).

Prior to the increase in the Yard Company's charges there was no amount to be collected from the consignee on account of the Yard Company's service, since the absorption tariffs of the line haul carriers covered its entire charge. The practice of including the Yard Company's charges in the

expense bill, while new as to that company, was not new in the district, and in placing same in the bill, there was no departure from established practice in such cases.

In the preparation of the bill thus collected by the Yard Company, the commission men, the Yard Company and the railroad collaborated. Method of preparation is described by Witness Mosier, Vice President, Live Stock Exchange, in Defendant's Exhibit 8, pages 121-123; Witness Park, Traffic Manager of the Live Stock Exchange, Defendant's Exhibit 8, pages 97, 98 and 122, and by Kemp, Joint Agent of the line-haul carriers, Defendant's Exhibit 11, pages 1218-1220. They agree and show the method substantially as follows:

The waybills covering individual cars are delivered to representatives of the Yard Company at unloading chutes by road haul carriers and while cars are being unloaded by employees of the Yard Company, other employees of the Yard Company are preparing bulletins announcing arrival. Contents of cars are delivered to consignees so notified by Yard Company's representatives. The waybills are accompanied by a sheet showing the counts of consignments and are delivered to the joint railroad office by a representative of Yard Company, where the rates are revised, the counts passed on to a live stock stub and the live stock stub extended at the proper rate is delivered to commission firm or consignee extended at the minimum weight, the actual weight not being in possession of the carrier. The commission firm inserts the actual weight, less tariff shrinkage allowance, extends the excess over the minimum, if any, and returns the live stock stub to the railroad office for further verification. If figures are found erroneous, stub is returned to commission firm for further handling. If extensions are found correct, waybill is corrected in accordance with the information shown on the stub, the waybill being reported to the interstate carrier's auditor and the live stock stub sent to Auditor of the Yard Company for collection of the freight

charges. Collections are made by Yard Company twice a week. After making the collection, Yard Company pays same over to railroad office every Wednesday morning, covering all collections during previous week.

Line-haul rates for transporting live stock were predicated on carload shipments being loaded and unloaded by the shippers. (Defendant's Exhibit 6, page 459).

The tariffs of the line-haul carriers were not offered in evidence except the Lowery Tariff covering terminal charges including the absorptions the line-haul carriers would make for switching, loading and unloading livestock and other services of connecting carriers. (Exhibit 2 to Defendant's Exhibit 1).

Tariff Provisions Requiring Shippers to Load and Unload Livestock.

Official Classification No. 44 effective prior to, at the time and subsequent to the increase in loading and unloading charges by the Yard Company contained the rules, general regulations, terms and conditions of transportation and form of Uniform Live Stock Contract applicable to line-haul carriers east of Chicago. Title page, pages showing participating carriers and also pages 30, 48, 49, 220, 221, 223 and 224 of such Official Classification, duly certified, attached to Defendant's Exhibit 1 as a part of Exhibit 3 thereto; also portions of Supplements Nos. 20 and 29 thereto, were offered in evidence.

This classification with supplements issued by the Director General continued in effect during Federal control. (R. 296-297).

In Official Classification No. 44 under head of "Rules and Special Instructions" is the following:

"Unless otherwise provided, when property is transported subject to the provisions of the Official Classification, the acceptance and use are required, respectively, of the Uniform Bill of Lading "straight" or "order" (pages 41-44 inclusive), export bill of lading (pages 45-47 inclusive), Uniform Livestock Contract (pages 48 and 49) * * *"

The form of Uniform Live Stock Contract referred to on pages 48 and 49 contains in Section 5 of Conditions thereto the following:

"The shipper at his own risk and expense shall load and unload said livestock, and in case any person shall accompany said livestock in charge of the same, take care of, feed and water said livestock while being transported."

Such contract further provides that the livestock is received subject to the classifications and tariffs in effect, and that the carrier,

"agrees to convey to its usual place of delivery at said destination, if on its road; otherwise to deliver to another carrier on the route to said destination."

Rule 8 thereof on page 223 provides:

"The consignor and consignee are responsible for loading and unloading the same, the carrier assuming no liability whatever in regard to loading and unloading." (Exhibit 3 to Defendant's Exhibit 1).

Western Classification No. 54 applicable at the time to the western roads as continued in effect through Western Classification No. 55 and Supplement No. 1 thereto issued by the Director General, (R. 297-298), provides on page 249:

"It should be understood, in receiving livestock of any description for transportation that the actual delivery does not commence until the stock has been placed in the car and the responsibility of the railroad company

shall cease upon the delivery of the car at the station to which consigned, the consignor and consignee to load and unload the same."

Rule 22, Western Classification No. 55 on page 13, provides:

"Section 1. Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers carried at carload ratings."

On page 282 of said Classification it is provided:

"It should be understood, in receiving live stock of any description for transportation, that the actual delivery does not commence until the stock has been placed in the car, and the responsibility of the railroad company shall cease upon the delivery of car at station to which consigned, the consignor and consignee to load and unload the same."

Such provision is contained on page 21 of Supplement No. 1 to Western Classification No. 55. Western Classifications Nos. 54 and 55 and Supplement No. 1 thereto are offered in evidence as Exhibit 5 to Defendant's Exhibit 1, original certified to this Court. (R. 297-298).

Consolidated Freight Classification No. 1 issued by the Director General includes all railroads under Federal control and takes the place of Official Classification, Western Classification and Southern Classification, and contains the rules, general regulations, form of contract, terms and conditions governing transportation on all railroads under Federal control, including all involved in this suit subsequent to the issue thereof. Copies of title page, pages showing participating carriers, pages 47, 48, 246 and 250 are attached to Defendant's Exhibit 1 as Exhibit 6 thereto, duly certified and were offered in evidence. (R. 298-299).

On pages 47 and 48 is set out the Uniform Live Stock Con-

tract containing the provisions theretofore contained in the Uniform Live Stock Contract, a part of the Official Classification and hereinbefore quoted.

Intrastate shipments in Illinois were governed by Illinois Classification, appropriate portions thereof attached to Exhibit 7 to Defendant's Exhibit 1. (R. 299). Such Classification on page 5, Paragraph B, provides:

> "Consignors and consignees will be required to load and unload all freight upon which carload ratings are applied."

Defendant's Exhibit 1, paragraph 44, (R. 240) provides:

> "All shipments of live stock involved in this suit consisted of carloads moved on carload ratings as ordinary live stock."

Witness Byers, Freight Traffic Manager, Chicago & North Western Railway Co., testified that classifications and tariffs of the carriers provide that it is the duty of the shipper to load and unload live stock and that such had been tariff provisions for as long as he could remember. (Defendant's Exhibit 6, pages 455 and 456).

Witness Mosier, Vice President and Chairman, Transportation Committee, Chicago Live Stock Exchange and a commission merchant of long experience, testified he was familiar with the live stock shipping contract long in use by the railroads covering transportation of live stock and that such contract continuously provided that the shipper must load and unload his stock. (Defendant's Exhibit 6, page 150).

I. & S. Docket 1118 and I. C. C. No. 9977.

On July 17, 1917, the Yard Company issued a supplement to its tariff which had increased its loading and unloading charges by which the Yard Company sought to cancel its

charges as a tariff matter, on the theory that it was no longer subject to the Act to Regulate Commerce, and was not require to file tariffs of its charges with the Commission. The Commission suspended such supplement and set the matter down for hearing under I. and S. Docket No. 1118 and thereafter extended such suspension order from time to time, thus keeping the tariff covering the Yard Company's charges in effect.

On November 17, 1917, the Chicago Live Stock Exchange filed a complaint with the Interstate Commerce Commission, which was docketed as I. C. C. No. 9977 and was offered in evidence as Defendant's Exhibit 2. (R. 243-256). This was before Federal control and the railroad companies and the Yard Company were sole defendants. No shipper or commission merchant and no plaintiff in this suit was named in such complaint. Complaint was made therein that the 25c increase in the Yard Company's tariff and collection thereof from the shippers was a violation of Sections 1 and 3 of the Act to Regulate Commerce, I. & S. Docket 1118 and I. C. No. 9977 were consolidated, testimony was taken and on February 11, 1919, the Commission rendered its opinion reported in 52 I. C. C. 209 dismissing the complaint.

The opinion is in evidence as plaintiff's Exhibit 1. (R. 121-141). In that proceeding the Yard Company insisted that by reason of the change in the form of its lease to the Junction Company, it was no longer a common carrier and therefore not required to publish and maintain tariffs of its charges, but the Commission, after full consideration, denied such contention, saying:

> "The inevitable conclusion is that the Stock Yard Company is now, as to shipments of live stock to and from the Stock Yards, a common carrier engaged in interstate commerce, and subject to the provisions of the Interstate Commerce Act." (R. 129).

The Commission also, after reviewing its former decisions on the subject and the decisions of the courts, held that the duty to load and unload live stock was a duty of the shipper, and since no question as to reasonableness of the rate charged was presented, dismissed the complaint and closed the investigation. In concluding its opinion, the Commission said:

> "The soundness of the view that ordinarily it is the duty of the shipper to load and unload carload freight cannot be questioned. What is there, then, respecting shipments of live stock in carloads that differentiates such shipments from that of other articles so clearly as to shift the responsibility and duty of loading and unloading from the shipper to the carrier?" (R. 131).

After discussing the reasons urged in behalf of the shippers, the Commission said:

> "They disregard the facts that the stock yard company is made a common carrier by the terms of its charter; that it has been held to be such by the Supreme Court of the United States; that its facilities for loading and unloading live stock are not on the rails of the line-haul carriers; and that these facilities are reached by the rails of the Chicago Junction Railway." (R. 136).

The Commission also said:

> "From the facts of record it is clear that the stock yard company is a common carrier within the meaning of section 1 of the act. It is performing services in connection with the receipt and delivery of interstate shipments. As above stated, the stock yard company was held to be a common carrier by the Supreme Court, and there has been practically no change in its status since that decision was rendered." (R. 137).

In response to exceptions filed to the report of the Examiner, the Commission further said:

"It is contended that the service is for the carriers' benefit and not that of the shippers. It is clear that the line-haul carriers are under no obligation to load or unload live stock for shippers, and if they do so they are entitled to compensation therefor. In the absence of tariff provisions to the contrary this is a separate and distinct service not included in the transportation rate. We have held that for loading and unloading, and for all other special services apart from conveyance, the carriers may properly make a reasonable charge since they are not accessorial parts of the transportation which section 1 requires the carriers to furnish. Dunnage Allowances, 30 I. C. C. 538, 543." (R. 138).

In final conclusion the Commission said:

"Upon the facts of record we find that—

1. The Union Stock Yard & Transit Company of Chicago is a common carrier engaged in interstate commerce and subject to the provisions of the act to regulate commerce.

2. The notice of cancellation of its tariff of charges for loading and unloading live stock, in carloads, at the Chicago stock yards has not been justified.

3. The loading and unloading of live stock, in carloads, at the Chicago stock yards is a duty of the shipper." (R. 138-139).

The Stock Yards were not taken under Federal control. The Director General was not a party to the foregoing proceedings. (R. 139).

The order suspending the cancellation tariff of the Yard Company was allowed to lapse and the Commission on March 13, 1919, amended its order dismissing the complaint by requiring the Yard Company to file a supplement to its tariff restoring and continuing the tariff sought to be cancelled in effect *nunc pro tunc* as of December 31, 1918. (R. 237).

The Yard Company and Live Stock Exchange filed petitions for rehearing and on April 14, 1919, the proceeding was reopened and in the order so doing, the Director General of Railroads was named as a *Respondent*. (R. 237-238). Fur-

ther testimony was thereafter taken, no amendment being made to the complaint in respect to the Director General or otherwise. (R. 294-295). (Exhibits 8 and 9 to Defendant's Exhibit 1, certified copies of docket entries).

On February 28, 1920, the Transportation Act of 1920 was approved by the President and became effective. The Act contained an amendment to Section 15 of the Act to Regulate Commerce as follows:

> "Transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stock yards shall include all necessary services of unloading and reloading en route, delivery at public stock yards of inbound shipments in suitable pens and receipt and loading at such yards of outbound shipments without extra charge therefor to the shipper, consignee or owner." (49 U. S. C. A., Section 15, Paragraph 5).

This provision became effective at the end of Federal control March 1, 1920, and the railroad companies having been restored to the possession of their properties, amended their tariffs in compliance therewith and provided therein for absorbing the entire loading and unloading charge at the Union Stock Yards, Chicago. On July 15, 1920, the Commission rendered its opinion in said proceedings on rehearing, (58 I. C. C. 164) in which, without serious discussion, it adhered to its conclusion that the Yard Company was a common carrier and announced that it was in error in its former opinion in holding that the duty to load and unload live stock was that of the shipper. In that opinion the Commission said:

> "For the reasons stated we are of opinion that our finding that it is the duty of the shipper to load and unload live stock in the stock yards at Chicago was error, and it is therefore reversed. And we now find that it was the duty of the carriers to unload and load live stock at that point." (R. 144).

In reversing its conclusion the Commission does not mention the foregoing tariff provisions making it the duty of the shipper to load and unload live stock, but relies entirely on the fact that the absorption provision in the tariffs of the carriers had, prior to the increase in charges of the Yard Company, covered the entire loading and unloading charge at Chicago.

In such opinion the Commission said:

> "We adhere to our finding that the stockyard company is a common carrier engaged in interstate commerce. As the services of unloading and loading are part of the transportation of live stock the collection of separate charges from the shippers for unloading or loading in addition to the rates on live stock from and to interstate points to and from the stockyards was an unlawful and unreasonable practice." (R. 144-145).

No reparation order was entered in that proceeding.

I. C. C. 12614.

On February 25, 1921, the Chicago Live Stock Exchange filed a complaint with the Interstate Commerce Commission charging as a violation of the Act to Regulate Commerce, the collection of the 25c additional charge of the Yard Company. All of the railroad companies transporting live stock to the Stock Yards in Chicago, as well as the Director General of Railroads as Agent, were made defendants. (R. 238 and Defendant's Exhibit 3, R. 257-267). The plaintiffs in this suit are named therein as members of the Live Stock Exchange, but not directly as complainants. After setting forth the names of plaintiffs as commission merchants and members of the Exchange, the complaint alleges:

> "That said above named individuals, firms, copartnerships and corporations on their own behalf, as con-

signees of inbound shipments or as consignors of outbound shipments, or as factors or agents for the consignors of inbound shipments or as factors or agents for the consignees of outbound shipments, paid to defendants each and all of the charges complained of as unlawful."

Also:

"There is filed herewith and made a part hereof and marked Appendix A, a list which gives the names of individuals, copartnerships and corporations, the address of each of which is, care of Chicago Live Stock Exchange, Union Stock Yards, Chicago, Ill. This list includes the names of additional shippers not now included in the record, and also the names of shippers already filed of record, and also the names of shippers who made intrastate shipments during the period of Federal control, who, together with the parties named in paragraph II hereof (the commission men) paid and bore the unreasonable and unlawful charge of 25c per carload for loading and unloading live stock at the Union Stock Yards at Chicago." (R. 264).

Answers were filed by the various defendants and testimony was taken at various times. All of such testimony including that offered in I. & S. 1118 and I. C. C. No. 9977 is contained in Defendant's Exhibits 6, 7, 8, 9, 10 and 11, Stenographer's Transcripts offered in evidence and certified to this Court. (R. 269-271).

The method and course of dealing between the commission men and shippers is described by many witnesses and concerning which there is no dispute. The following is typical:

D. C. Mosier, Vice President, Chicago Live Stock Exchange and Chairman of its Transportation Committee, also a commission man, member of firm of Rosenbaum Bros. & Company, one of the plaintiffs, testified:

"When this stock is received at the yards by the Commission men, they pay all the charges, the yardage charges, the freight terminal charges, and remit to the shipper the net proceeds of the consignment." (Defendant's Exhibit 8, pages 30-31).

Witnesses were examined in behalf of each of the petitioners, there being more than one hundred witnesses. The following is typical:

L. F. Weeks of Bowles Live Stock Commission Company, testified:

"Q. To whom were the loading and unloading charges paid by your firm? To the line-haul carrier or to the stockyards company?

A. We paid the stockyards company." (Defendant's Exhibit 9, page 199).

He also testified that in every case the amount was charged to the shipper. (Defendant's Exhibit 9, pages 200 and 201).

William S. Burmister, a member of Martin Bros. & Co., testified:

"Q. To whom did you pay the charges? To the stockyards company or the line-haul carriers?

A. The checks were all made out to the Union Stock Yard & Transit Company.

Q. And all of the charges paid to that company?

A. Yes, sir.

Q. Now, did you, in making settlement with the shippers, charge them for the unloading charges?

A. Yes, sir. * * *

Q. Now, Mr. Burmister, is a uniform plan or uniform method of payment of charges followed by every commission firm?

A. Yes, sir." (Defendant's Exhibit 9, pages 207-209, 219 and 220).

Fred D. Gillogly of the firm of Gillogly & Co., testified:

"Q. For whom did you pay these charges?
A. Paid them for the owner and consignor.

* * * * * * * * *

Q. I mean by that you subsequently collected the amount that you paid here for loading and unloading from the owner of the stock, is that correct?
A. Well, we deduct all charges before we pay the principal anything." (Defendant's Exhibit 9, pages 271, 272 and 277).

Charles A. Wilson of W. W. Wilson & Co., plaintiff, testified:

"In every case where you paid this charge you collected the amount from the owner of the stock, didn't you?
A. Yes.

* * * * * * * * *

Q. You got the 25 cents, though, from the shipper?
A. We paid that with his own money, not with our money." (Defendant's Exhibit 9, pages 363 and 364).

Seth B. St. John of Brown-St. John Co., a plaintiff, testified:

"Q. And, as the matter now stands, your firm isn't out of pocket any money by reason of the payment of these unloading charges?
A. We are just simply deducting the total amount of the expense of the shipment and depositing to their credit the net amounts after all of this expense is taken out." (Defendant's Exhibit 11, page 953).

Authority for Collecting the Additional Charge.

C. C. Chace, Auditor of the Yard Company, testified:

"Q. Do you know under what authority the loading and unloading charges were collected or assessed?
A. On the authority of the Stock Yard's tariff." (Defendant's Exhibit 9, page 181).

Mr. O. T. Henkle, General Manager of the Yard Company; testified that if the Commission would permit the Yard Company to cancel its tariff containing the charge complained of, the Yard Company would cease collecting same from the shipper. (Defendant's Exhibit 6, page 342).

That the Commission regarded the tariff of the Yard Company as requiring the collection of the additional 25c from the shipper is shown by provision in the opinion of the Commission, which recites that for a time on some roads, the additional charge was not collected from the shipper, and permitted the cancellation of such uncollected charges. (Plaintiff's Exhibit 3, R. 156).

The 25c additional charge was placed in the expense bills because the tariff of the Yard Company required it to be collected. (Testimony Coffey, Defendant's Exhibit 6, page 681).

In the course of hearing at Chicago, March 13th to 16th, 1918, the complainant through its counsel, Mr. Barnes, refused to consent to the cancellation of the Yard Company's tariff and Mr. Cowan, counsel for the shippers at that time, stated that so long as tariff was in effect, the shipper would have to pay the increased charge. (Defendant's Exhibit 6, pages 106-107).

Theory of Petitioners.

In the course of the various hearings before the Commission, the theory of the sought-for awards was repeatedly stated by Mr. Clair R. Hillyer, attorney for the Chicago Live Stock Exchange and the commission men. At hearing on October 3, 1922, Mr. Hillyer stated:

> "The theory on which this is being tried is that these people are the factors and agents of these principals; that they have title to the property; that they can sell it in their names; they can sue and be sued for it in

connection with it; they are liable for all of these charges legally, and that they have every right to come in here and collect this money as factors in their own right." (Defendant's Exhibit 9, page 27).

On the same date Mr. Hillyer, in response to statement of counsel for the Yard Company, said:

"I had better correct your impression of that right of agency, Mr. Towner, because that is not the basis of our case at all. The basis of our case is that these people have a legal right to collect this money under the decisions of the Commissions and the courts, and that it is not necessary for them to disclose here what they are going to do with it after they get it."

Thereupon Mr. Towner inquired:

"Is it your theory for my information, that these complainants would have the legal right not only to recover reparation but to retain it?"

And Mr. Hillyer answered, "Yes." (Defendant's Exhibit 9, page 236).

Certain witnesses mentioned the giving of powers of attorney to the commission men to act for them in recovering the charges complained of. The testimony of George Moone, office manager of Petersen, Turnbull & Company, is illustrative:

"Q. At what time did this concern which you represent authorize the Chicago Live Stock Exchange to file this complaint?

A. Early in May 1917.

Q. And in what manner?

A. We got complaints from our shippers and we went and got powers of attorney from all of those fellows and turned them over to Mr. Park to go ahead and go along any way he found fit to collect this for our customers.

Q. You say you got powers of attorney?

A. Yes.
Q. From whom?
A. From our customers in the country.

* * * * * * * * *

Q. These papers that you denominate powers of attorney. Have you them present?
A. No, sir. I turned them over to Mr. Park.

* * * * * * * * *

Q. Are they filed in this record?
A. I don't know."

Whereupon Mr. Hillyer responded:

"No, they are not in the record and they are not going to be put in. We are not relying on them at all. They are just so much waste paper as far as this case is concerned." (Defendant's Exhibit 9, pages 316 and 317).

On the same date in the course of the proceedings, Mr. Hillyer further stated:

"It is my view that legally these shippers, commission men, entitled to collect this money and keep it if they want to, but we are volunteering the information to the Commission that they do not intend to do it and that they intend to pay it back to the people *who bore the charge* and that is the policy of the exchange to its customers and is the testimony of the witness Mosier, who is chairman of the Traffic Committee of the Exchange in his sworn testimony before the commission that he is going to pay it back. But that has nothing to do with the legal rights in the case." (Defendant's Exhibit 9, page 563).

The Yard Company was conducting on its premises the greatest live stock market in the world and the live stock were destined to such market for sale. They had to be moved from the receiving pens at the docks to sales pens of the respective commission men, consignees, before being sold. The sales pens were the final destination. Shipments

were billed to the Stock Yards and were required to pass over the rails of the Junction Company over which the line-haul carriers had trackage rights by paying a per car trackage charge in order to reach the docks of the Yard Company. To complete transportation, the stock must be unloaded and moved to the sales pens. This was the function and service of the Yard Company on account of which it had the rights and was burdened with the obligations of a common carrier.

The line-haul carriers had no right to go upon them and could not perform the physical act of loading or unloading thereat. (Defendant's Exhibit 6, pages 288-290).

The unloading docks, chutes and receiving pens were owned and maintained by the Yard Company as a necessary facility for delivering the live stock to the market it was maintaining. The market without such facilities was impossible. The railroad companies did not maintain yards for such stock on their own lines because if unloaded in their own pens, the stock would have to be driven to the Stock Yards in order to reach the market for sale, and since the purpose of the shipment was to sell the stock on the market, it had to be taken to the place where the market was maintained and it was necessary that the service of the common carrier maintaining and operating the facilities for reaching the market be utilized. (Testimony Witness Mosier, Defendant's Exhibit 6, pages 143-6; Defendant's Exhibit 7, page 1026).

The Commission rendered its opinion June 2, 1925, and same has been offered in evidence as plaintiff's Exhibit 3. (R. 147-157). In such opinion the Commission said:

> "Most of the reparation claimed is by the live stock commission merchants, members of the exchange, covering amounts collected from them for the unloading service at the stockyards. They seek reimbursement in their own names and rights as parties to the trans-

portation transactions who paid the charges to the defendant carriers and also as factors and agents for and on behalf of the live stock shippers who were the consignors. While it is admitted that in each and every instance the charge which was paid by the commission merchant was subsequently charged back and collected from the consignors, this would not affect the right of the complainant consignees to awards of reparation." R. 151).

Also:

"We find that the following individuals, copartnerships, and corporations, parties of record, made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to reparation, as factors and agents for the shippers, with interest from date of payment."

Following the foregoing all of the petitioners are named. (R. 151-156).

Following the opinion of the Commission is the following concurring opinion by Commissioner Hall:

"I join in the award of reparation to those complainants only as constrained thereto by the decision of the majority in *Missouri Portland Cement Co. v. Director General*, 88 I. C. C. 492, and am authorized by Commissioners Esch, Lewis and Cox, to say that their participation in the award is under the same constraint." (R. 156).

Following the rendering of such opinion, Rule V Statements were filed by petitioners, and pursuant thereto, the award sued on was entered on December 12, 1927. (R. 157-210). These statements were offered as Exhibit 1-A before the Commission at hearing October 3, 1922. (Defendant's Exhibit 9, page 44, and on the trial of this case as Defend-

ant's Exhibit 37. R. 283). They consist of many thousand sheets of paper furnishing tabulated information as to the various shipments, and are contained in a large box which has been certified to this Court. (R. 283; R. 410). Such award is in part as follows:

> "We find that complainants shown in the following table are entitled to awards of reparation from the defendants named below in the amounts set opposite their respective names, with interest." (R. 158).

The petitioners are named as individuals and the awards are in part against the various railroad companies and in part against the Yard Company and the Director General as *Agent. No allowances are indicated in favor of any petitioners in a representative capacity.* The Yard Company and the Director General, denying the validity of the Commission's award, refused to pay the same and this suit was brought.

THE ISSUES.

Petitioners sued in their own behalf and not in a representative capacity, or for the benefit of anyone except themselves. In Paragraph 1 of their petition they allege:

> "1. The plaintiffs named in Paragraph 2 hereof bring this suit against Andrew W. Mellon, Director General of Railroads, as Agent, the Union Stock Yards and Transit Company as defendants * * * to recover as damages certain amounts hereinafter specifically designated *paid by the plaintiffs* to the defendants named * * *
>
> 2. The following named plaintiffs are and each of them is named in an order of the Interstate Commerce Commission, entered on the 12th day of December, 1927, as *being entitled to receive* from the defendants hereinafter named, the amounts respectively set forth in said order of the Commission, a copy of which is hereto

attached as Exhibit A and made a part hereof * * *. The following named are the plaintiffs herein *and are the parties entitled to receive the damages awarded by the Interstate Commerce Commission.*" (R. 4. Italics ours).

Then follows a complete list of the names of the petitioners herein. Various opinions and orders of the Commission are attached as exhibits with appropriate allegations to entitle petitioners to the *prima facie* effect thereof, and they rely very largely upon such *prima facie* effect, as provided in Section 16 of the Act to Regulate Commerce.

The prayer of the petition is:

"WHEREFORE, by reason of the premises, the defendants have become and are indebted to the plaintiffs in the said sum of One Hundred Forty Thousand, One Dollar and Twenty-five Cents ($140,001.25), and interest thereon * * * and the plaintiffs therefore pray judgment against the defendants, etc." (R. 18).

The Director General as Agent answered, (R. 30-45), challenging the validity of the award on various grounds, including the following:

The charges of the Yard Company were imposed by its tariffs filed with the Interstate Commerce Commission, pursuant to its duty as a common carrier engaged in interstate commerce, and were collected and retained by it; that as such common carrier, the Yard Company was required to file and enforce its tariff by collecting the charges imposed; that the charge was not imposed by any tariff, rule or regulation of the Director General and was not collected by him and he did not receive the money collected or benefit thereby; that the duty to load and unload live stock was that of the shipper and such loading and unloading was not covered by the tariffs or transportation furnished by the line-haul carriers; that the absorption tariffs of the line-haul carriers limited their contribution to the Yard Com-

pany's charges to the specific amounts named therein; that the collection of a separate charge for unloading by the Yard Company, pursuant to its published tariff, was not an unreasonable or unlawful practice; that the charges were not paid by plaintiffs in said suit; that such plaintiffs suffered no damage by the collection thereof and do not have such title or interest as will permit them to maintain the suit; that the stock yards were not the terminals of the line-haul carriers but were the property and facilities of an independent common carrier furnishing the portion of the transportation which included unloading and delivery to consignees; that the findings, reports and orders relied upon in support of the award sued on were without support in the evidence and were contrary to law; that the Interstate Commerce Commission was without jurisdiction to make an award against the Director General as Agent on account of the collection of the Yard Company's charges from the shippers.

THE TRIAL.

On the trial in the District Court, petitioners offered in evidence the various opinions and orders of the Commission and brief testimony of H. R. Parks, Traffic Manager, Live Stock Exchange, in reference to the manner of making up bills for collection of the charges, the payment of same, and in general, methods of operation of the Stock Yards and the conduct of the business of the Commission merchants, same being in harmony with the facts as hereinbefore stated in reference thereto. (R. 216-232).

Petitioners also offered in evidence Paragraphs 1 to 11, inclusive, and 26 to 46 inclusive, of Stipulation of Facts signed by the parties, certified in the original to this Court as Defendant's Exhibit 1. (R. 233-240 and 410).

The facts therein have already been set forth in this state-

ment. The defendants offered in evidence stenographic transcripts of all testimony taken before the Interstate Commerce Commission in I. & S. 1118 and I. C. C. Nos. 9977 and 12614, including all exhibits referred to therein, being all of the evidence before the Commission. Such stenographic transcripts are marked Defendant's Exhibits 5, 6, 7, 8, 9, 10 and 11. (R. 268-271). The exhibits offered at said hearings before the Commission and mentioned in Defendant's Exhibits 5 to 11 inclusive were marked Defendant's Exhibits 12 to 45, both inclusive. (R. 271-292). Defendant's Exhibits 5 to 45, both inclusive, have been certified to this Court.

Respondents also offered in evidence the stipulation signed by the parties, a portion of which was offered by petitioners, same being marked Defendant's Exhibit 1 and which, with the exhibits attached thereto, has been certified in the original to this Court. Paragraphs 1 to 11, inclusive, and 26 to 46, inclusive, not including the exhibits referred to therein and offered by petitioners, are found at pages 233 to 240 of the record, and Paragraphs 12 to 25 inclusive, included in the offer of the entire stipulation as Defendant's Exhibit 1, are found at pages 296 to 299 of the record. Respondents also offered in evidence as Defendant's Exhibits 2 and 3, copies of the complaints filed in I. C. C. Nos. 9977 and 12614, respectively. (R. 243-267). Also Defendant's Exhibit 4, a copy of the order of the Commission dated April 8, 1922, reopening the proceedings in I. C. C. No. 9977 and consolidating same with I. C. C. No. 12614 for hearing. (R. 267-268).

The Director General also offered testimony of Thomas H. Gillis, Assistant Secretary of the Commission and in charge of its records, to the effect that the dockets of the Commission contained no indication that Complaint No. 9977 was ever amended to state a complaint against the Director General or that any notice of that complaint or of the order of the Commission making the Director General re-

spondent in I. & S. 1118 or in I. C. C. No. 9977 was ever given the Director General, or that the Director General ever appeared in said proceeding. (R. 294-296).

The Stipulation of Facts (Defendant's Exhibit 1) with the exhibits thereto, includes many facts not shown in the evidence before the Interstate Commerce Commission. Respondents relied on such new evidence and also on the testimony taken before the Commission both as showing the facts on which their defense is based and showing lack of evidence before the Commission to support its findings and orders. The Trial Court had before it all of the evidence before the Commission, as well as the additional evidence offered by the parties on the trial. The essential facts in the evidence before the Commission, as well as the additional evidence offered on the trial in the lower Court, have already been stated herein.

At the conclusion of the testimony, respondents moved for a directed verdict in their favor and such motions were sustained. The motion of the Director General is set forth at pages 55 to 59 of the record. The written opinion of the Trial Court in sustaining such motions is found at pages 60 to 77 of the record. From a judgment entered upon the verdicts directed by the Court, the plaintiffs appealed to the Circuit Court of Appeals of the Seventh Circuit, which affirmed the judgment of the lower Court. The case has been brought here on petition for certiorari granted by this Court.

SUMMARY OF ARGUMENT.

I.

FUNDAMENTAL MISCONCEPTION OF PETITIONERS AS TO THE FACTS.

A. The Published Tariffs of the Line-Haul Carriers Covered Transportation to the Stock Yards, But Did Not Include Unloading the Stock.

Petitioners erroneously contend that the line-haul rate, plus the $2.00 terminal charge, included the unloading of the live stock. Such tariffs, as well as Uniform Live Stock Contract a part thereof, expressly precluded such duty. The absorption tariffs of the line-haul carriers provided for absorbing a certain amount in cents per car for loading and unloading. The $2.00 terminal charge was investigated by Commission and involved in *Interstate Commerce Commission vs. C. B. & Q. Railway Co.*, 186 U. S. 320. This charge was justified because of the trackage charge of the Junction Company and the amount then being absorbed of the loading and unloading charges of the Yard Company. The Yard Company was a common carrier and its charge was covered by its tariffs. When it increased its charges, the line-haul carriers refused to increase their absorptions.

B. The Yard Company was not the Agent of the Line-Haul Carriers in Performing Any Transportation Service or in Publishing and Enforcing its Tariffs.

United States vs. Union Stock Yards & Transit Co., 226 U. S. 286.

Act to Regulate Commerce, Section 6, Paragraph 4, (49 U. S. C. A. Section 6, Paragraph 4, page 281). (Appendix 131).

The Yard Company was a common carrier and required to file and maintain its tariffs. In its tariff increasing its charges, it recited in parentheses that its charges were "as a carrier's agent." The alleged agency was repudiated and did not exist, and the Commission so found. (R. 137).

C. No Matter of Administrative Discretion was Involved in the Decision of the Interstate Commerce Commission.

Great Northern Railway Company vs. Merchants Elevator Co., 259 U. S. 285-294.
United States Navigation Co. vs. Cunard S. S. Co., 52 Sup. Ct. Rep. 247-9.
Interstate Commerce Commission vs. C. B. & Q. R. R. Co., 186 U. S. 320.
Meeker vs. Lehigh Valley Railway Company, 236 U. S. 412.
Interstate Commerce Commission vs. Louisville & Nashville Railway Co., 227 U. S. 88-91-92.
Interstate Commerce Commission vs. Union Pacific R. R. Co., 222 U. S. 541-7.
Chicago, Rock Island & Pacific Railway Co. vs. United States, 274 U. S. 29-33.
Chicago Junction case, 264 U. S. 258-63.
Act to Regulate Commerce, Section 6, Paragraph 1: (49 U. S. C. A., Section 6, Paragraph 1, pages 240-241). (Appendix 130).

In its second opinion the Commission said:

"The facts in this case are not in dispute." (R. 144)

There was no question as to reasonableness of the Yard Company's charges or of the rates of the line-haul carriers. The Commission's finding was not based on discrimination. (R. 139). The tariffs were not complicated and no technical words were involved. A question of law was presented in the construction of them.

II.

THE EVIDENCE WAS INSUFFICIENT TO SHOW THE DUTY OF LOADING AND UNLOADING LIVE STOCK AT THE STOCK YARDS WAS THAT OF THE LINE-HAUL CARRIERS OR THAT THE LINE-HAUL CARRIERS SHOULD ASSUME THE EXPENSE THEREOF.

Act to Regulate Commerce, Sec. 1, Par. 6, (49 U. S. C. A., Sec. 1, Par. 6, Pg. 12). (Appendix 130).
Act to Regulate Commerce, Sec. 15, Par. 5, (49 U. S. C. A. Sec. 15, Par. 5, Pg. 426). (Appendix 132).
Act to Regulate Commerce, Sec. 20, Par. 11, (49 U. S. C. A. Sec. 20, Par. 11, Pgs. 87-88).

The Yard Company was a connecting terminal common carrier, publishing its own tariffs, and was not on the rails of the line-haul carriers. They merely had trackage rights over the rails of the Junction Company to reach the yards, but no right to go upon the Yard Company's premises. The tariffs placed the duty of loading and unloading on the shipper. The service was a part of the transportation to be performed on the premises of the terminal carrier, by its forces and pursuant to its tariff. The Commission found:

> "In the absence of tariff provisions to the contrary, this is a separate and distinct service not included in the transportation rate." (R. 138).

III.

THE STOCK YARDS WERE NOT THE TERMINALS OF THE LINE-HAUL CARRIERS.

The Yard Company was operating a great public market to which the live stock was consigned for sale. It was the owner and in exclusive possession of the facilities for un-

loading and delivery in the sales pens. Such was the transportation service it performed under its tariffs. The line-haul carriers had no contract with the Yard Company or right to go upon its premises, and had no financial interest in the Yard Company or its property. They placed the live stock at the docks in the same way cars are placed on transfer tracks of connecting or terminal carriers generally.

IV.

THE YARD COMPANY WAS A COMMON CARRIER SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION, AND ITS TARIFFS PRESCRIBING CHARGES FOR ITS TRANSPORTATION SERVICES FURNISH THE LEGAL RATE THEREFOR, WHICH IT WAS BOUND TO GOLLECT.

United States vs. Union Stock Yards & Transit Co., 226 U. S. 286.
Chicago Livestock Exchange vs. A. T. & S. F. Ry. Co., 52 I. C. C. 209.
Chicago Livestock Exchange vs. A. T. & S. F. Ry. Co., 58 I. C. C. 164.
Louisville & Nashville Ry. Co. vs. Maxwell, 237 U. S. 94-7-8.
Keogh vs. C. & N. W. Ry. Co., 260 U. S. 156-163.
Louisville & Nashville Ry. Co. vs. Central Iron Works, 265 U. S. 59-65.

Loading and Unloading was a Transportation Service for which the Carrier Performing the Service was Entitled to Compensation and for which the Shipper was Bound to Pay.

Covington Stock Yards vs. Keith, 139 U. S. 128-136.
United States vs. Union Stock Yards & Transit Co., 226 U. S. 286-304.
Act to Regulate Commerce, Sec. 1, Par. 3, (49 U. S. C. A., Sec. 1, Par. 3, Pg. 11).
C. M. & St. P. Ry. Co. vs. Wisconsin, 238 U. S. 491.

The transportation service of unloading was necessarily performed on the premises, with the facilities and by the employes of the Yard Company. It was entitled to compensation therefor and its tariffs fixed its charges. To the extent such charges were not absorbed pursuant to tariffs of connecting carriers, it was entitled and bound to collect.

V.

THE INCREASED CHARGE OF 25c PER CAR WAS COLLECTED FROM THE SHIPPER BY THE YARD COMPANY AND THE CIRCUIT COURT OF APPEALS CORRECTLY SO HELD.

Petitioners allege (R. 13) and the Commission found (R. 123) that:

> "The Stock Yard Company collected and retained such charges from the shippers."

The undisputed testimony in behalf of all petitioners is that checks payable to the Yard Company were given covering these charges. The fact that composite bills covering the freight charges and the increased charge of the Yard Company were presented and paid in one check to the Yard Company, and that the Yard Company turned entire amount over to the line-haul carriers weekly and presented its bills monthly, for both the absorbed and unabsorbed portion of its charges, did not deprive the act in collecting from the shippers of being the act of the Yard Company. Such facts do not overcome the finding of the Commission that the Yard Company collected and retained such charges. The practice of including in one bill the charges of both the line-haul and terminal carriers was a usual one. In holding that the charges were collected by the Yard Company, the Circuit Court of Appeals was in harmony with the finding of the Commission and with the facts.

VI.

THE MAKING AND COLLECTING OF A SEPARATE CHARGE FOR THE SERVICE OF THE YARD COMPANY IN LOADING AND UNLOADING THE LIVESTOCK WAS NOT AN UNLAWFUL OR UNREASONABLE PRACTICE, AND SUCH FINDING OF THE COMMISSION IS WITHOUT SUPPORT IN THE EVIDENCE AND IS CONTRARY TO THE EVIDENCE AND ALSO CONTRARY TO LAW.

Interstate Commerce Commission vs. C. B. & Q. R. R. Co., 186 U. S. 320.

Interstate Commerce Commission vs. Stickney, 215 U. S. 98-104-5.

Act to Regulate Commerce, Sec. 6, Pars. 1 & 7, (49 U. S. C. A., Sec. 6, Pars. 1 & 7, Pgs. 238-283). (Appendix 130, 131).

VII.

NEITHER THE EFFORTS OF THE YARD COMPANY TO FORCE THE LINE-HAUL CARRIERS TO PAY ITS INCREASED CHARGE BY INSERTING IN PARENTHESES IN ITS TARIFF THE WORDS, "AS A CARRIER'S AGENT," NOR ITS ALLEGED ADMISSIONS CAN CREATE AN OBLIGATION ON THE LINE-HAUL CARRIERS TO PAY SUCH CHARGE OR CREATE A LIABILITY ON THEIR PART FOR THE COLLECTION OF SUCH CHARGES BY THE YARD COMPANY.

Act to Regulate Commerce, Sec. 6, Par. 4 (49 U. S. C. A., Sec. 6, Par. 4, Pg. 281). (Appendix 131).

The line-haul carriers were not named in, nor did they concur in the Yard Company's tariff. They did not authorize the Yard Company to increase its charges and refused to increase their absorptions to cover same. The Yard Company was not their agent and the Commission so found. (R. 137).

Such fact is also conclusively shown in the testimony. Admissions and acts of an alleged agent cannot bind the alleged principal who promptly repudiates same. The Yard Company was not under Federal control.

VIII.

CONGRESS DID NOT CONSENT THAT THE AGENT APPOINTED BY THE PRESIDENT MIGHT BE PROCEEDED AGAINST BEFORE THE INTERSTATE COMMERCE COMMISSION FOR A TORT, BUT ONLY FOR DAMAGE RESULTING FROM THE "COLLECTION OR ENFORCEMENT BY OR THROUGH THE PRESIDENT DURING THE PERIOD OF FEDERAL CONTROL OF RATES, FARES, CHARGES, REGULATIONS AND PRACTICES."

Davis, Agent vs. Donovan, 265 U. S. 257-263.
Transportation Act 1920, Section 206-c, (49 U. S. C. A. Sec. 74, Pg. 357). (Appendix 132).

IX.

THE ABSORPTION TARIFFS OF THE LINE-HAUL CARRIERS FURNISH THE MEASURE OF THEIR OBLIGATION AND LEGAL RIGHT TO CONTRIBUTE TO THE PAYMENT OF THE YARD COMPANY'S CHARGES.

Act to Regulate Commerce, Sec. 1, Par. 6, (49 U. S. C. A. Sec. 1, Par. 6, Pg. 237). (Appendix 130).
Act to Regulate Commerce, Sec. 6, Par. 7, (49 U. S. C. A. Sec. 6, Par. 7, Pg. 237). (Appendix 131).

Section 1, Paragraph 6, of the Act to Regulate Commerce makes it the duty of all common carriers to establish and enforce proper classifications with reference to which rates are prescribed and proper regulations affecting same and in respect to the form and substance of tickets, bills of lading, etc. Section 6, Paragraph 7 of the Act, forbids participation

in transportation by any common carrier until it has complied with Paragraph 6 of Section 1, and further provides that no carrier shall refund or remit in any manner any portion of the rates so specified or extend to any shipper any privilege or facilities except such as are specified in the tariffs. The absorption tariff constituted a concession to the shipper, a remission of a part of the line-haul rate, which could be justified only by filing a tariff fixing the amount to be absorbed. It was just as essential to comply with the absorption tariffs as any other tariffs of the carriers.

X.

THE DECISION OF THE DISTRICT COURT THAT THESE PETITIONERS HAD NO RIGHT TO MAINTAIN THIS ACTION WAS CORRECT.

Order of reparation was made to petitioners in their own names and right and not in any representative capacity and suit was brought by them in the District Court in their own names and right and not in any representative capacity to recover damages for a violation of the provisions of the Interstate Commerce Act, and upon their failure to show that they had suffered any pecuniary loss therefrom the District Court was justified in directing a verdict in favor of the respondents.

Upon appeal the Court of Appeals affirmed the judgment of the District Court but upon wholly different grounds, deciding the case on the merits. *Adams, et al. vs. Mellon, et al.*, 51 Fed. (2d) 620.

Even though the District Court may have given erroneous reasons for its judgment in favor of the defendants, such error did not result in prejudice to the petitioners because they were given their day in court by the Court of Appeals when it rested its judgment on the merits.

Camp vs. Gress, 250 U. S. 308, 317.
Y. & M. V. Ry. Co. vs. Mullins, 249 U. S. 531, 532-533.

The only party entitled to recover reparation is the one who paid and bore the charges on account of which recovery is sought, and who has been damaged thereby.

Sections 8 and 16 of the Interstate Commerce Act. The charge in question was paid, that is, advanced by the commissionmen, petitioners, out of the monies belonging to the consignors. The petitioners sold the live stock sent to them as commissionmen and out of the proceeds from said sales paid the alleged unlawful charge and after deducting the same, remitted the balance to the consignors.

Penna. R. Co. vs. International Coal Co., 230 U. S. 184, 200.
Spiller vs. A. T. & S. F. Ry. Co., 253 U. S. 117, 135.
Parsons vs. C. & N. W. Ry., 167 U. S. 447.
Meeker vs. Lehigh Valley R. Co., 236 U. S. 412, 430.

The order of the Commission awarding reparation to the petitioners having been based on the decision of the Commission in the case of Missouri Portland Cement Co. vs. Director General, 88 I. C. C. 492, and said decision being contrary to law, said order was invalid.

The Commission held in the *Portland Cement* case that the party entitled to recover reparation was he who physically paid the unlawful charge although he may have suffered no pecuniary loss by so doing. In reaching this conclusion, the Commission misconstrued the opinion of this

court in *Southern Pacific Co. vs. Darnell-Taenzer Co.*, 245 U. S. 531. The Commission construed said opinion as holding that the Commission was only required to ascertain who physically passed the money to the carrier, and that it was immaterial to inquire as to whether such party actually suffered any pecuniary loss on account of having made such payment. The Commission also failed to properly interpret the decision of this court in *L. & N. R. Co. vs. Sloss-Sheffield Co.*, 269 U. S. 217. Also see *Illinois Central R. Co. vs. Vest, et al.*, 39 Fed. (2d) 658.

XI.

NO QUESTION OF PUBLIC IMPORTANCE OR OTHER QUESTION JUSTIFYING THE GRANTING OF A WRIT OF CERTIORARI IS PRESENTED, AND IT MUST NOW APPEAR THAT THE WRIT IN THIS CASE WAS IMPROVIDENTLY GRANTED AND SHOULD BE DISMISSED.

Layne & Co. vs. Western Well Works, Inc., et al., 261 U. S. 387-393.
Magnum Import Co. vs. Coty, 262 U. S. 159-163.

Having shown that the line-haul rate plus the $2.00 terminal charge did not include the unloading of the live stock, that the Yard Company did not occupy the relation of agent to the line-haul carriers in performing its transportation service or in filing its tariff, and that the Circuit Court of Appeals did not in its decision usurp the function of the Commission, it must now appear that the questions presented in the petition for certiorari upon which the writ was granted and which are urged in petitioners' brief, are not presented by the real facts in the case and that the writ was therefore improvidently granted and should be dismissed.

ARGUMENT.

I.

FUNDAMENTAL MISCONCEPTIONS OF PETITIONERS AS TO THE FACTS.

Petitioners' contentions are very largely based on fundamental misconceptions of the true facts in the case. They mistakenly contend:

(A) That the published tariffs of the line-haul carriers cover the complete transportation of the live stock from point of origin to the Stock Yards, including the unloading at the yards in consideration of the line-haul rate, plus a $2.00 terminal charge, whereas the undisputed testimony is that such tariffs covered transportation to the docks of the Yard Company only with the obligation, however, because of their absorption tariffs, to pay the Yard Company's charges to the extent of 25c for unloading and 50c for loading each car of live stock.

(B) That the Yard Company in filing its tariffs covering its charges and in performing the unloading service did so as agent of the line-haul carriers, whereas the testimony and the law conclusively establish the contrary.

(C) That administrative functions of the Commission were exercised in making the order relied upon, whereas such functions were in no way involved.

When such mistaken notions as to the facts are shown, the legal propositions presented by petitioners will be found to be largely without relevancy. We therefore give such matters first consideration.

A. The Published Tariffs of the Line-Haul Carriers Covered Transportation to the Stock Yards, But Did Not Include Unloading the Stock.

Such tariffs did provide for absorbing the Yard Company's charges for unloading in the specific amount of 25c

per car. The Yard Company was an independent common carrier performing part of the transportation to destination on its own premises and with and upon its own facilities. It published and maintained its own tariffs which covered the loading and unloading of the live stock. *United States vs. Union Stock Yards and Transit Co.*, 226 U. S. 286. Notwithstanding change in its lease with the Junction Company after being required to file its tariffs as a common carrier in the foregoing suit, the Commission in its first opinion (R. 128) 52 I. C. C. 209, held that it was still a common carrier and required to maintain its tariffs, which conclusion was adhered to in its second opinion, (R. 144), 58 I. C. C. 164, and the Yard Company was refused permission to cancel its tariff. The entire transportation, therefore, involved the movement on the rails of the line-haul carriers and over the rails of the Junction Company to the yards, for which the line-haul rate, plus the $2.00 terminal charge, was applicable, and over the docks through the chutes and passageways of the yards to the sales pens of the commission men covered by the Yard Company's tariff. Not only the tariffs of the line-haul carriers and the Yard Company differentiated between the service of the respective carriers, but the ownership of the docks and yards and the physical facts preclude any idea of the line-haul rate and $2.00 charge covering the unloading. The tariffs of the line-haul carriers covering transportation to the Stock Yards were not offered in evidence either before the Commission or the Court, but the testimony offered in respect thereto not only does not show the transportation by the line-haul carriers covered the unloading, but conclusively shows the contrary.

The absorption tariffs in which all line-haul carriers joined, known as the "Lowery Tariff", and covering terminal charges which would be absorbed by the line-haul carriers was not offered in evidence before the Commission, but was offered in Court. Such tariff is attached to Defendant's Ex-

hibit 1 as Exhibit 2 thereto. This exhibit is not printed in the record, but the original was certified as a part thereof and is before the Court. The absorption tariff, (Page 37), provides:

"CARRIERS AS SHOWN WILL PAY THE UNION STOCK YARDS AND TRANSIT COMPANY'S CHARGES AS FOLLOWS:

Loading	Unloading
In cents per car	In cents per car
50	25 "

All line-haul carriers joined in such tariff. The rates of the line-haul carriers were predicated on the live stock being loaded and unloaded by the shippers. (Witness Byers, Defendant's Exhibit 6, page 459; not printed in record, but original certified up as a part thereof).

The tariffs of the line-haul carriers were with reference to the appropriate classifications and referred thereto, and to the absorption tariff for the terminal charges that would be absorbed. (Witness Byers, Defendant's Exhibit 7, pages 1251 and 1252, not printed in record, but certified up as a part thereof).

In Defendant's Exhibit 1, it is stipulated by the parties that the classifications provide "general regulations, form of contracts and terms and conditions for the said transportation by said line-haul carriers." (R. 297, Paragraph 12 and Paragraph 16; R. 298, Paragraph 20; R. 299, Paragraph 23).

The Classifications provided:

"The consignor and consignee are responsible for the loading and unloading the same, the carrier assuming

no liability whatever in regard to the loading and unloading."

(Official Classification, Rule 8, page 223, Exhibit 3 to Defendant's Exhibit 1; Western Classification No. 54, Rule 11, page 249, Exhibit 4 to Defendant's Exhibit 1; Western Classification No. 55, Rule 3, page 282, Exhibit 5 to Defendant's Exhibit 1; Consolidated Freight Classification No. 1, issued by the Director General and including all carriers under Federal control, page 64, Exhibit 6 to Defendant's Exhibit 1).

Consolidated Classification, Rule 8 (b), page 70, Section 1, being Exhibit 6 to Defendant's Exhibit 1, and Western Classification No. 55, Rule 22, page 13, Section 1, being Exhibit 5 to Defendant's Exhibit 1, provide:

> "Owners are required to load into or on cars freight for forwarding by rail carriers and to unload from cars freight received by rail carriers carried at carload ratings."

Illinois Classification covering intrastate shipments in Illinois, Rule 19, provides:

> "(b) Consignors and consignees will be required to load and unload all freight upon which carload ratings are applied." (Exhibit 6 to Defendant's Exhibit 1).

All shipments involved consisted of carloads moving on carload ratings. (Stipulation of parties, Defendant's Exhibit 1, R. 240, Paragraph 44.)

Defendant's Exhibit 1 is a Stipulation of Facts in forty-six paragraphs and is printed in the record. Preamble, Paragraphs 1 to 11 both inclusive, and paragraphs 26 to 46 both inclusive, are found in Record 232 to 240, and paragraphs 12 to 25, both inclusive, are found in Record pages 296 to 299, both inclusive. The exhibits to Defendant's Exhibit 1 are not printed, but the original Defendant's Exhibit

1, with all exhibits thereto, has been certified up as a part of the record.

The Uniform Livestock Contract published in the Official and Consolidated Classifications, and used by all line-haul carriers for many years provided in the receipt for the live stock as follows:

> "THIS AGREEMENT * * * WITNESSETH, That the carrier has received from the shipper, subject to the classifications and the tariffs in effect, on the date of issue of this Agreement, the live stock described below in apparent good order, except as noted, consigned and destined as indicated below, *which the carrier agrees to carry to its usual place of delivery at said destination if on its road; otherwise to deliver to another carrier on the route to said destination.*" (Italics ours).

Said contract also provides in Section 5 of Conditions that the shipper is to load and unload the live stock at his own expense. (Exhibit 3 to Defendant's Exhibit 1, pages 71 and 72; Exhibit 6 to Defendant's Exhibit 1, pages 62 and 63; Testimony Witness Mosier, Defendant's Exhibit 6, page 150 not printed in record, but original certified up as a part thereof).

During the time the Yard Company's charges were 25c for unloading and 50c for loading, the absorption tariff of the line-haul carriers permitted them to pay the full amount of the Yard Company's charges, and during such time the shippers paid only the line-haul rates plus the terminal charge of $2.00, but that does not mean that the line-haul carriers held themselves out to transport the stock to the Stock Yards and unload the same for the line-haul rate, plus the terminal charge. It means that so long as the absorption tariff might remain in effect and the Yard Company's charges remained the same, the shipper would have to pay no more than such rates. The fact that the amount agreed to be absorbed covered the entire charge of the Yard Company furnishes the only foundation for petitioners' claim that the line-

haul carriers' tariffs covered the unloading as well as the transportation of the live stock to the Stock Yards.

Such fact also furnishes the only basis for the statement in the Commission's second opinion, (R. 144), that

> "For more than fifty years, carriers delivering live stock at the stock yards in Chicago have loaded and unloaded live stock and made no charge therefor against the shipper."

This suggestion, coupled with the fact that the shipper could not do the physical act of loading and unloading, furnshes the ostensble reason for the change in the Commission's views as to whose duty it was to do those acts. The loading and unloading were required to be done on the premises owned and in exclusive possession of the terminal common carrier, and neither the shipper nor the line-haul carrier could go upon such premises to perform such service without its consent, and neither had such consent.

The terminal carrier did the loading and unloading and the line-haul carrier during such period absorbed its charges —pursuant to published tariffs, limiting the amounts that would be absorbed to specific amounts in cents per car. Such facts, however, do not justify the statement in the Commission's opinion that the unloading was done by the "carriers delivering live stock at the stock yards;" nor do such facts justify the contention that such service is included in the tariffs of the line-haul carriers further than the provision in the absorption tariffs for absorbing a specific amount of the Yard Company's charges for performing such service.

Petitioners repeatedly assert that the terminal charge included the loading and unloading of the live stock. Such statement is erroneous. The terminal charge was established on account of the charge the Junction Company made against the line-haul carriers for use of its rails in moving the cars, by the line-haul carriers over the Junction Company's rails

to and from the Stock Yards, and also took into consideration the fact of the absorptions the line-haul carriers were making pursuant to their absorption tariffs. The trackage charge made by the Junction Company against the line-haul carriers was 75c per car each way (loaded one way and empty the other), a total of $1.50 per car. The cost to the line-haul carriers in moving the car each way with their own locomotives and crews was a substantial amount, and in addition, the line-haul carriers were absorbing 25c for unloading and 50c for loading each car of live stock. (Testimony Witness Byers, Defendant's Exhibit 6, pages 475-6, not printed in record, but original certified up as a part thereof).

These facts justified the *amount* of such $2.00 terminal charge, but do not show any agreement or obligation to do the unloading as such. The absorption tariff was a notice to the shippers that they would be relieved from the payment to the Yard Company of its tariff rates, to the extent, therein specifically stated; viz., 25c per car for unloading and 50c per car for loading, and that the trunk line carriers would pay such amounts to the Yard Company for its services; not that such trunk line carriers would perform the services themselves, but simply that they would pay said amounts to the Yard Company for the services performed by it. The tariffs, classifications and Uniform Livestock Contract precluded the idea of any obligation to load or unload. There was no obligation on the part of the trunk lines to continue such absorptions, and if said absorption tariff had been withdrawn, the shippers would have had to pay to the Stock Yard Company the amount of its tariff rates, in addition to the road-haul rates, plus the terminal charge of $2.00 per car.

The fact that the amount being absorbed for loading and unloading was considered at the time the $2.00 charge was established would not require the increasing of the absorptions to cover increased charges of the Yard Company without increasing the terminal charge. This thought is empha-

sized when it is remembered that the terminal charge was established because of the trackage charge of the Junction Company and the amounts being absorbed for loading and unloading. On a car loaded in an empty out, the line-haul carrier paid the Junction Company 75c each way or $1.50 for the movement in and out, and also paid the Yard Company for unloading 25c, making a total of $1.75, leaving but 25c to cover services of its crew and equipment in making the movements.

In case of a car loaded at the yards, the absorption was 50c for loading, thus consuming the entire $2.00 charge and leaving nothing for the services of the crew and equipment of the line-haul carrier. When we remember the reasonableness of the $2.00 charge is not attacked in this case, and that it was found reasonable in *Interstate Commerce Commission vs. C. B. & Q. R. R. Co.*, 186 U. S. 320, when operating costs were much lower than during the time complained of, the facts presented would seem to preclude any idea of an obligation on the part of line-haul carriers to assume payment of the Yard Company's increased charges.

In their statement of facts on page 5 of their brief, petitioners say:

> "The Union Stock Yards is specifically named in the tariffs of the line-haul carriers as a station to which their line-haul rates apply."

They cite page 167 of certified excerpts from original exhibits. Such page 167 is a portion of Exhibit 2 to Defendant's Exhibit 1—the Lowery Tariff, covering terminal and absorption charges of the line-haul carriers. This tariff does not show line-haul rates at all. On page 167, being page 35 of the Exhibit from which it is taken, the Union Stock Yards, Illinois, is shown to be a station on the Chicago Junction Railway, and there is nothing thereon to justify petitioners' statement quoted above.

On page 169 of such certified excerpts of original exhibits is set forth page 37 of Exhibit 2 to Defendant's Exhibit 1. It will be noted same states, about middle of page:

> "Basis for rates to and from facilities of the Chicago Junction Railway."

Beneath such statement, among other things, are found rates on live stock from or to industries, chutes and sidings of the Junction Company in carloads. This statement contains the terminal charge for moving a car of stock between the rails of the line-haul carrier and the Stock Yards over the rails of the Junction Company. Also beneath such statement, "Basis for rates to and from facilities of the Chicago Junction Railway," is the following:

> "Carriers as shown will pay the Union Stock Yards and Transit Co.'s charges as follows: Loading charges, 50c; unloading charges, 25c."

These tariffs, therefore, do not justify statement of petitioners above quoted and do show the contrary of petitioners' statement to be true. The finding of the Commission in this proceeding likewise refutes petitioners' contention that the line-haul rate, plus the $2.00 terminal charge, includes the service of unloading. In the course of its first opinion, the Commission stated:

> "Its (Yard Company's) facilities for loading and unloading live stock are not on the rails of the line-haul carriers, and these facilities are reached by the rails of the Chicago Junction Railway." (R. 136).

The Commission also found:

> "In *Boardman & Co. vs. S. P. Co.*, 37 I. C. C. 331, the Commission stated that in the absence of tariff provisions to the contrary, the line-haul rate of a particular carrier includes the receipt or delivery of carload freight

only at industries or other points located upon its own rails. In this case there are no tariff provisions requiring the line-haul carriers to make deliveries off their rails." (R. 138).

In its first opinion, (R. 138), the Commission found:

> "In the absence of tariff provisions to the contrary, this (loading and unloading) is a separate and distinct service not included in the transportation rate."

The only tariff provision of the line-haul carriers having reference to loading and unloading is the absorption tariff providing for absorbing specific amounts in cents per car. That tariff did not assume any obligation in respect to the acts of loading and unloading. Such acts were physically performed by the Yard Company, as the commission found. Such tariff merely provided for paying the Yard Company's charges for loading and unloading in the amount of 25c for unloading and 50c for loading. Surely the absorption tariff is not a "tariff provision to the contrary." The absorptions under the Lowery Tariff were before the Commission at the time of rendering its first opinion; also when rendering its second opinion. In the first opinion the Commission assumes that the absorption tariff is not a "tariff provision to the contrary," and in its second opinion, the Commission does not find that it does constitute such a tariff provision, but it appears to rely on the fact of such absorptions for the finding that the carriers bringing the live stock to the Stock Yards, had for fifty years been doing the loading and unloading without expense to the shipper. Such conclusion is not the result of administrative discretion, but if it were, the evidence conclusively shows that it is erroneous.

The Commission merely treated the fact that the absorptions during such period included the Yard Company's entire charge as constituting loading and unloading by the carrier bringing the live stock to the yards. In view of the

fact that the Yard Company actually did the loading and unloading, that the line-haul carriers merely complied with their absorption tariffs limiting their payments to specific amounts in cents per car, and of the fact that Paragraph 7, Section 6 of the Act to Regulate Commerce, (49 U. S. C. A. Section 1, Paragraph 6, page 12) expressly requires carriers to establish, observe and enforce classifications, rules and regulations in reference to rates, service and practices, including tickets and bills of lading and of the rules and regulations and provision of Live Stock Contract to which attention has been called, limiting the transportation of the line-haul carriers to their own lines, and expressly requiring the shipper to load and unload, it must be conclusively apparent that the service and rate of the line-haul carriers did not include the unloading or loading at the Stock Yards.

It is conclusively shown that the facilities of the Yard Company devoted to public use and with and upon which it performed its public carrier service were beyond the rails of the line-haul carriers. They could be reached only by passing over the rails of another common carrier (Junction Company). The right to pass over the rails of the Junction Company to the Stock Yards gave no rights in respect to the Stock Yards. There was no contract between the Yard Company and the line-haul carriers, and the relation existing between them on tendering shipments of livestock was that created by the law in respect to common carriers engaged in interstate commerce. It is thus seen that the record does not support petitioners' contention that the tariffs of the line-haul carriers covered the unloading of the live stock at the Stock Yards. On the contrary, the record affirmatively shows that the unloading was not included in the transportation furnished by the line-haul carriers or the line-haul rate plus the $2.00 terminal charge.

B. The Yard Company Was Not the Agent of the Line-Haul Carriers in Performing Any Transportation Service or in Publishing and Enforcing its Tariffs.

The Yard Company was an independent common carrier and was required by the Commission and the Court to publish and file a tariff covering its charges. (*United States vs. Union Stock Yards & Transit Company*, 226 U. S. 286). The line-haul carriers were not parties to that suit. The status of the Yard Company only was involved. In that case it was said:

> "The transportation of live stock begins with their delivery upon the cars and ends only after the stock has been unloaded and delivered, or offered to be delivered to the consignee, etc."

Because the Yard Company was the owner and operator of the facilities for unloading and delivering the stock, it was held to be a common carrier and required to file tariffs containing its charges for the service it performed. It could not as such common carrier having a sole duty of filing tariffs of its charges become the agent of the line-haul carriers in filing its tariffs or in performing its service without some provisions in the law binding upon all parties, or authority from the line-haul carriers. There is no thought, in the suit brought by the Commission, to force the Yard Company to file tariffs, that it should do so as agent of the line-haul carriers, as principals, otherwise the principals would have been made parties to the suit. There was no statutory provision creating that relation and no authority from the line-haul carriers. The only basis of petitioners' contention that such relation existed is the acts and statements of the Yard Company and its representatives, which were entirely gratuitous and continuously and publicly challenged and denied by the line-haul carriers. The admis-

sions, statements and conduct of an alleged pretended agent are not competent evidence against the alleged or pretended principal to prove that an agency exists. Such doctrine is elementary and fundamental. The Yard Company was attempting to relieve itself of the responsibility of a common carrier in order to force the line-haul carriers to assume payment of its charges and relieve the shippers who were its customers of such duty. Its tariffs filed in pursuance of the order of the Court did not contain any suggestion of agency. Thereafter it changed the form of its lease with the Junction Company in the hope of escaping its common carrier capacity, and when it increased its charges, injected in its statement of charges in parentheses the words "as a carrier's agent."

In its cancellation tariff which was suspended by the Commission and in which it sought to repudiate its capacity as a common carrier, it stated:

> "The loading and unloading platforms of the Union Stock Yards and Transit Company of Chicago will in the future be used or available for the use of the railways entering Chicago and using them as terminal stations under operating agreements."

This cancellation tariff which was suspended and never in effect does not claim any agency, but it does hold out an invitation to the line-haul carriers to make a contract with it. Such contract was never made. In no other tariff of the Yard Company, either before or subsequent to the one increasing its charges, was there any suggestion of agency. (Exhibit 1 to Defendant's Exhibit 1, original certified as a part of the record to this Court).

That the Yard Company had no authority from the line-haul carriers to publish such tariffs or to increase its charges or to act for them in doing so, is shown by the testimony of General Manager Henkle of the Yard Company (Defend-

ant's Exhibit 6, pages 344-354; Defendant's Exhibit 7, page 1212), and of Auditor Chace of the Yard Company, (Defendant's Exhibit 6, page 372); also by testimony of H. W. Byers, Freight Traffic Manager, Chicago & North Western Railway Company (Defendant's Exhibit 7, page 1260).

Section 6, Paragraph 4, of the Act to Regulate Commerce provides:

> "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission.* * *" (49 U. S. C. A., Section 6, Paragraph 4, page 281, appendix 131).

The tariff of the Yard Company does not contain the names of the line-haul carriers as parties thereto, or otherwise. (Exhibit 1 to Defendant's Exhibit 1). The files of the Commission show no concurrence therein by the line-haul carriers. (Testimony Witness Gohegan. Defendant's Exhibit 11, page 1242.) The Yard Company's tariff was therefore not a joint tariff and was not filed as agent of the line-haul carriers. As an independent common carrier having its own responsibilities and duty, and in performing the common carrier's service upon its own property devoted to public use, the Yard Company was in no sense an agent of the line-haul carriers. That the Yard Company was not the agent of the line-haul carriers was found by the commission in its first opinion. (R. 137).

That it was their agent in collecting freight charges, just as any delivering carrier collects freight charges of the initial carrier, may be conceded, but such fact does not show or create the relation of agency in reference to transportation services. Suggestion is made that the fact that the Yard Company counted the stock, checked their condition, un-

loaded and made a record of the dead and injured, is evidence of agency. Such services, while necessary to be performed for the protection of the carrier, are no part of the transportation, but if they were, they were the services that every delivering carrier performs for its own protection and in its own interest, as well as that of the initial carrier. Since suit may be brought and a recovery had against either for any loss, damage or injury to an interstate shipment, and a remedy is given the carrier held liable to the shipper against its connecting carrier, it is necessary as between connecting carriers that condition at time of delivery by one carrier to another, and to the consignee, be ascertained and evidence thereof made available. That one carrier depends upon another for such matters does not make the other its agent, but merely shows willingness to rely upon its diligence and fairness. Reciprocity in such matters is the usual practice among connecting carriers. Surely petitioners' contention that the Yard Company was the agent of the line-haul carriers in filing its tariffs and in performing its transportation services is without any foundation in law, and cannot be the basis of a liability on the part of the Director General.

C. No Matter of Administrative Discretion was Involved in the Decision of the Interstate Commerce Commission.

Petitioners lay great stress upon the thought that the tariffs of the carriers were voluminous and complicated; that the Circuit Court of Appeals, in construing them, usurped the function of the Commission. Petitioners entirely misapprehend the facts. The tariffs of the line-haul carriers covering the line-haul rates were not offered in evidence. Such tariffs were assumed to furnish a commodity rate, but neither the amount of it nor the language used in stating the rate were before the Commission or the Court. The tariff covering the $2.00 terminal charge was not before

the Commission, although the amount thereof was stated by witnesses, together with the elements entering into it, when established, and the service performed in respect to it. The absorption tariffs were not before the Commission but the substance thereof was shown in the testimony. Such tariffs were before the Court as Exhibit 2 to Defendant's Exhibit 1, and we have seen the language thereof is as simple as language can be—no room for construction.

The classifications were not before the Commission, but oral evidence of their provisions in certain respects was presented. Excerpts from such classifications covering pertinent provisions were before the Court as exhibits to Defendant's Exhibit 1. The Yard Company's tariffs were not in evidence before the Commission, but oral evidence of the provisions thereof was offered. Such tariffs were offered as evidence in Court as Exhibit 1 to Defendant's Exhibit 1. The foregoing are the only tariffs involved and they are neither voluminous, complicated or ambiguous; nor do they contain any technical terms requiring construction by the Commission. The tariff provisions are of the character presented in *Great Northern Railway Co. vs. Merchants Elevator Co.*, 259 U. S. 285-294. The language of this Court in that case is peculiarly pertinent:

> "Here no fact, evidential or ultimate, is in controversy and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of the words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction, and preliminary resort to the Commission was therefore unnecessary."

In the very recent case of *United States Navigation Co. vs. Cunard S. S. Co.*, 52 Supreme Ct. Reporter, 247-9, it is said:

> "But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

In the case at bar there is no dispute in the evidence. There are no inferences of an administrative or discretionary character to be drawn therefrom. The Commission did not consider the reasonableness of any rate, did not consider the amount of absorption the line-haul carriers should reasonably make, did not find discrimination, but on the contrary, did find that failure to absorb all of the Yard Company's charges at Chicago, while at other points all such charges were absorbed, did not amount to discrimination. (R. 135-139).

The Commission's award of reparation is based on its finding:

> "As the services of unloading and loading are a part of the transportation of live stock, the collection of separate charges from the shippers for unloading or loading, in addition to the rates on livestock from and to interstate points to and from the Stock Yards, was an unlawful and unreasonable practice." (R. 144-145).

In view of the fact that such finding is based on undisputed facts, a question of law was presented, and the finding of the Commission is one of law rather than of administrative discretion and was, we think, so intended by the Commission. As said in *Interstate Commerce Commission vs. Louisville & Nashville R. R. Co.*, 227 U. S. 88-91:

> "But the legal effect of evidence is a question of law."

The provisions of Section 16 paragraph 2 of the Act to Regulate Commerce making the findings and orders of the Commission *prima facie* evidence of the facts found there-

in furnish a rule of evidence which may be supplemented or contradicted by any competent evidence. Such provisions furnish only a rebuttable presumption in cases of this character, and the findings and orders of the Commission will be set aside if contrary to the indisputable character of the evidence, or contrary to law. *Meeker vs. Lehigh Valley Railroad Company*, 236 U. S. 412-428; *Interstate Commerce Commission vs. Louisville & Nashville Railway Co.*, 227 U. S. 88-91-92; *Interstate Commerce Commission vs. Union Pacific Railroad Co.*, 222 U. S. 541-7; *C. R. I. & P. Railway Co. vs. United States*, 274 U. S. 29-33. The evidence relied on must be offered at a hearing. The Commission cannot rely on matters within its own knowledge, but not offered as evidence. *Chicago Junction* case, 264 U. S. 258-63.

The facts relied on by the Commission and before this Court are that the Yard Company was and is a common carrier, that at the suit of the Commission, this Court so held and required it to file and maintain tariffs covering its loading and unloading charges; that it complied with such requirement; that the line-haul carriers were also required to file tariffs covering their charges; also all departures therefrom, and all allowances or concessions to shippers, and to maintain classifications which they were obliged to adhere to; that they filed their line-haul tariffs and terminal tariffs as well as their classifications; that the terminal tariffs provided for a $2.00 terminal charge and their absorption of 25c for unloading and 50c for loading each car of stock by the Yard Company; that their classifications and their live stock contracts required the shipper to load and unload at his own expense; that departure therefrom was not permitted except by tariff provisions; that the absorption tariffs were a departure to the extent specifically stated in cents per car; that the tariffs covered delivery to destination if on the carrier's line; otherwise delivery to connecting carrier; that the loading and unloading docks, chutes and

yards were not on the lines of the line-haul carriers, but were the facilities of the Yard Company devoted by it to public use; that for many years the absorptions of the line-haul carriers had equaled the Yard Company's charges and the shipper had not been obliged during such period to contribute thereto; that the Yard Company increased its charges and the line-haul carriers refused to increase their absorptions, with the result that collection of the increase was made from the shipper. None of these facts or any other fact was in dispute. In view thereof, a question of law was presented and it was within the province of the Court to determine whether the Commission decided such question of law correctly.

It will be noted that the finding of the Commission was not that the loading and unloading should be performed without charge to the shipper. The service being for the shipper's benefit and a part of transportation, the requiring of the performance thereof without charge would be contrary to the Constitution and would amount to the taking of property without just compensation and without due process of law. That was not intended by the Commission. What it did find was that the collection of *separate* charges therefor was "an unlawful and unreasonable practice."

In other words, the charge should be, in the view of the Commission, included in the line-haul rate or in the terminal charge. That was a conclusion of law. That the making of a separate charge for a terminal service is not unlawful was held in respect to the $2.00 terminal charge in *Interstate Commerce Commission vs. C. B. & Q. R. R. Co.*, 186 U. S. 320. That case was in reference to the terminal charge of the line-haul carriers while here we have the only transportation charge made by a terminal carrier for its own services.

The Commission in its opinion made no reference to the provisions of Paragraph 1, Section 6 of the Act to Regulate

Commerce (49 U. S. C. A., Section 6, Paragraph 1, pages 240-241, appendix 130), which provides:

> "The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried and shall contain the classification of freight in force, *and shall also state separately all terminal charges,* storage charges, icing charges and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise shall affect or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee."

In view of the foregoing provision of the Commerce Act, as we will show in a later division hereof, it would have been proper for the line-haul carriers, in cases of delivery on their own lines, to make a separate charge for unloading, and if reasonable and the line-haul rate reasonable, both charges would be upheld. In the case at bar, however, the separate charge is that of an independent common carrier for its only transportation service for which it made a charge. In view of the statute and of the facts, the conclusion of the Commission was not in the exercise of an administrative discretion, but was the determination of a question of law, and its conclusion subject to be reviewed by the Court.

The Yard Company had been required to file its tariffs covering the specific charge in question. Without such tariff it could not engage in the transportation and could not receive any compensation. Not only was it required to file its tariffs, but the Commission refused to permit it to withdraw them. In such a case, the collecting of the charge contained in its tariff cannot, as a matter of administrative discretion, be found to be unlawful or unreasonable. We say,

therefore, petitioners misapprehend the facts in urging that the Circuit Court of Appeals usurped a function of the Commission.

II.

THE EVIDENCE WAS INSUFFICIENT TO SHOW THE DUTY OF LOADING AND UNLOADING LIVE STOCK AT THE STOCK YARDS WAS THAT OF THE LINE-HAUL CARRIERS OR THAT THE LINE-HAUL CARRIERS SHOULD ASSUME THE EXPENSE THEREOF.

In its first opinion, 52 I. C. C. 209, dated February 15, 1919, (R. 121-141), the Commission held that such duty was that of the shipper. We commend to the Court the entire discussion in the opinion contained on pages 130 to 136 of record leading up to such conclusion. In answering the contention of the shippers, the Commission said:

> "They disregard the facts that the Stock Yard Company is made a common carrier by the terms of its charter; that it has been held to be such by the Supreme Court of the United States; that its facilities for loading and unloading live stock are not on the rails of the line-haul carriers." (R. 136).

Also:

> "It is clear that the line-haul carriers are under no obligation to load or unload live stock for shippers, and if they do so, they are entitled to compensation therefor. In the absence of tariff provisions to the contrary, this is a separate and distinct service not included in the transportation rate. We have held that for loading and unloading, and for all other special services apart from conveyance, the carriers may properly make a reasonable charge since they are accessorial parts of the transportation which Section 1 requires the carriers to furnish. Dunnage Allowances, 30 I. C. C. 538-543." (R. 138).

In its second opinion, 58 I. C. C. 164, rendered July 15, 1920, the Commission changed its mind as to whose duty it was to load and unload. In that opinion the Commission states:

> "The facts in this case are not in dispute. For more than fifty years carriers delivering live stock at the Stock Yards, Chicago, have loaded and unloaded live stock and made no charge therefor against the shipper." (R. 144).

We agree the facts are not in dispute. The evidence is the physical acts of loading and unloading were performed by the Yard Company. (Stipulation of Parties, Defendant's Exhibit 1, Paragraph 27, R. 236).

The line-haul carriers merely by virtue of their absorption tariffs paid the loading and unloading charges of the Yard Company so long as such charges did not exceed the amounts named in such tariffs.

The foregoing are the facts before the Commission not in dispute and on which it found the

> "carriers delivering live stock at the Stock Yards have loaded and unloaded live stock."

The evidence does not sustain such finding, but refutes it. The true facts shown are that for fifty years the Yard Company had loaded and unloaded the live stock, charging therefor 50c for loading and 25c for unloading, and that the carriers bringing the live stock to the Yards, had paid such charges pursuant to their absorption tariffs.

In the interval between the first and second opinions of the Commission, Congress in the Transportation Act of 1920, effective February 28, 1920, amended Section 15, Paragraph 5 of the Act to Regulate Commerce (49 U. S. C. A. P. 426, Section 15, Paragraph 5, appendix 132) as follows:

> "Transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stock yards, shall include all necessary services of unloading and reloading en route, delivery at public stock yards of inbound shipments in suitable pens and receipt and loading at such yards of outbound shipments without extra charge therefor to the shipper, consignee or owner."

Such enactment was not relied on to support the Commission's change of mind, but in our view, should have been relied on in support of its first conclusion. Congress evidently believed the shipper was required to pay for the loading and unloading as a separate matter in view of the existing transportation and tariff situations; otherwise it would not have enacted a law to relieve the shipper therefrom. This Act does not mean that the shipper is not to pay for the services rendered him, but that it shall thereafter be included in the line-haul carrier's rate.

Such enactment cannot affect the right of the parties as to past transactions, but does place on the line-haul carriers the duty of so adjusting their line-haul rates as to include compensation for this service and to so amend their absorption tariffs as to cover the entire charge of the Yard Company.

We understand the carriers have so construed the Act and have acted accordingly. That a statute was necessary to bring about the result argues forcefully, if not conclusively, that before the statute such duty did not exist and that the Yard Company performing the service was entitled to collect the charge from the shippers without any obligation on the part of the line-haul carriers, in the absence of absorption tariffs so providing, to pay such charge.

It will be noted the foregoing enactment is limited to ordinary live stock. "Ordinary live stock" is defined in Section 20, Paragraph 11 of the Act to Regulate Commerce, as follows:

"The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses and mules, except such as are chiefly valuable for breeding, racing, show purposes or other special purposes."

Since the Act is limited to *ordinary* live stock, we assume it can have no application to *other* than ordinary live stock, such as for breeding, racing, special purposes and the like. We inquire whose duty is it to load and unload other than ordinary live stock, and can a special charge be made against the shipper for such loading and unloading? If such is the case, upon what theory can the different treatment be based? If there is a duty to load and unload *other* than ordinary live stock by the shipper and if a separate charge can still be made therefor, we inquire why the same rule did not apply to *ordinary* live stock before the enactment forbidding the making of a separate charge for loading and unloading *ordinary* live stock.

It will be noted the amendment to the statute does not require the line-haul carriers to load or unload, does not require the Yard Company, a common carrier, to perform the service gratuitously, but does provide in effect that the line-haul carriers shall pay the Yard Company's charges out of the line-haul rate, and it must follow to be constitutional that the line-haul rate must be high enough to be reasonable in view of the added obligation.

In the foregoing discussion we have omitted reference to the classifications and tariffs of the line-haul carriers by which their contract was governed, and which expressly provide that the shipper shall unload live stock at their expense and which limit the absorptions of the line-haul carriers to specific amounts. Such tariffs, classifications, rules and regulations have been fully discussed under Subdivision A of Division I hereof, and we content ourselves here with referring thereto and with calling specific attention to the

provisions of Paragraph 6, Section 1, of the Act to Regulate Commerce, (49 U. S. C. A., Section 1, Paragraph 6, page 12 appendix 130), which provides:

> "It is made the duty of all common carriers subject to the provisions of this Act to establish, observe and enforce just and reasonable classifications of property for transportation with reference to which rates, tariffs, regulations or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates or tariffs, the issuance, form and substance of tickets, receipts and bills of lading * * *."

Being required to establish classifications, rules and regulations with reference to rates and tariffs, and regulations and practices affecting substance of tickets, bills of lading, etc., the carriers were also required to comply with such classifications, rules and practices. Pursuant to such requirement, the rules already referred to have been established and the reasonableness is not questioned in this proceeding. Pursuant thereto, the Uniform Live Stock Contract was published in the classifications providing that the carrier

> "agrees to convey to its usual place of delivery at said destination if on its road; otherwise to deliver to another carrier on the route to said destination," and "The shipper at his own risk and expense shall load and unload said live stock * * *."

The Commission in its first opinion held:

> "It is clear that the line-haul carriers are under no obligation to load or unload live stock for shippers, and if they do so, they are entitled to compensation therefor. In the absence of tariff provisions to the contrary, this is a separate and distinct service not included in the transportation rate." (R. 138).

There was no evidence of a tariff provision to the contrary, and nowhere does the Commission recede from the conclusion that in the absence of tariff provisions, the loading and unloading is a separate and distinct service not included in the transportation rate.

Suffice it to say that as a matter of law, as well as tariff regulations, the service of loading and unloading was not included in the transportation rate of the line-haul carriers. So far as the line-haul carriers were concerned, such duty was that of the shipper and could be performed only through the Yard Company as a common carrier engaged in owning and operating the facilities upon which such service was necessarily performed.

III.

THE STOCK YARDS WERE NOT THE TERMINALS OF THE LINE-HAUL CARRIERS.

Such conclusion of the Commission is entirely without support in the evidence and is contrary to law. We have shown that the Yard Company was a common carrier owning and operating the property and facilities on which its service was performed, that it had its own separate tariff covering its operations and charges, that no line-haul carrier had the right to go upon its premises, and did not do so. The fact that line-haul carriers did not maintain adequate yards of their own to accommodate all live stock brought by them to Chicago does not support such conclusion. The live stock was destined to a public market located on the premises of the Yard Company for purposes of sale. Yards maintained by the carriers at some other place would not meet the requirements of the shippers. If unloaded in carriers' yards, the stock would have to be driven through the city to the public market. Such a proceeding would be in-

tolerable. The shippers were entitled to have their stock transported to the market. The stock could only reach the market by going over the docks, into the chutes and through the passage-ways of the Stock Yards to the sales pens. These properties were all a part of the facilities of the independent connecting common carrier performing such services. Such services could be performed by no other carrier and constituted a part of the transportation to the final destination in the sales pens.

There was no contract between the Yard Company and the line-haul carriers and no relation other than that between connecting common carriers. The fact that the facilities constituted unloading docks, chutes and pens instead of rails can make no difference. Just as well say the rails of a terminal railway company on which an industry is located are the terminals of the line-haul carriers delivering carload shipments to the terminal company to be switched by its crews to the industry track of the industry or to team tracks convenient to the industry.

IV.

THE YARD COMPANY WAS A COMMON CARRIER SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION, AND ITS TARIFFS PRESCRIBING CHARGES FOR ITS TRANSPORTATION SERVICES FURNISH THE LEGAL RATE THEREFOR, WHICH IT WAS BOUND TO COLLECT.

We hesitate to seriously discuss this proposition. Such was the holding of the Circuit Court of Appeals and the ground upon which it affirmed the judgment of the District Court. We have shown that the Yard Company was an independent common carrier and was forced by the Commission through the judgment of this Court to file tariffs of

its charges, because, as the Commission contended and as the Court found, it was a common carrier in interstate commerce and subject to the Interstate Commerce Act. *United States vs. Union Stock Yards & Transit Co.*, 226 U. S. 286. Neither the Director General nor the corporate line-haul carriers had any interest in the Yard Company. The Yard Company was not a subsidiary of the corporate carriers and was not taken under Federal control by the President. We have shown that no relation of agency existed and no contract of any kind between the Yard Company and the line-haul carriers or the Director General. There were no joint tariffs. Their relations were as separate in ownership, in operation, contract and tariffs as two common carriers could possibly be. The Yard Company was performing a service the line-haul carriers could not perform because not on their lines of railroad. The fact that the line-haul carriers could place the cars at the docks of the Yard Company does not alter such fact. They could not go on such docks or into the chutes or pens to unload or make delivery any more than one trunk line carrier could go on the rails of another at a point of physical connection without the consent of such other carrier.

The decision of this Court holding the Yard Company to be a common carrier and requiring it to file tariffs covering its charges was based on the separate and independent status of the Yard Company and on the service it was performing. Its transportation service was a part of the through transportation of the live stock from point of origin to destination in the sales pens of the consignee. The service was for the shipper and for his benefit. The Yard Company was a necessary link in such transportation. Without its facilities and service, the transportation and delivery could not be completed. The line-haul carriers had by their own independent tariffs provided for absorbing its charges in the amount of 25c per car for unloading and 50c per car for

loading, and had been paying such amounts pursuant thereto to the Yard Company, but when it increased its charges and the line-haul carriers refused to amend their tariffs and absorb the increased amount, it was bound to collect the same from the party for whom it performed the service. It could not collect from the line-haul carriers because their tariffs did not permit them to pay the increased amount and because their tariffs limited their carrier duty to transportation on their own lines and delivery to a connecting carrier, —the Yard Company.

That carrier's tariffs furnish the legal rate to be collected and the carrier is bound to enforce its tariffs is too well established to justify serious discussion, but see *Louisville & Nashville Railway Company vs. Maxwell*, 237 U. S. 94-97-8; *Keogh vs. Chicago & North Western Railway Company*, 260 U. S. 156-163; *Louisville & Nashville Railway Company vs. Central Iron Works*, 265 U. S. 59-65.

Loading and Unloading was a Transportation Service for which the Carrier Performing the Service was Entitled to Compensation and for Which the Shipper was Bound to Pay.

"Transportation," as defined in Section 1, Paragraph 3, of the Act to Regulate Commerce (49 U. S. C. A., Section 1, Paragraph 3, page 11), includes

> "all instrumentalities and facilities of shipment or carriage * * * and all services in connection with the receipt, delivery * * * storage and handling of the property transported."

In *Covington Stock Yards vs. Keith*, 139 U. S. 128-136, it is held that,

> "The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars and ends only after the stock is unloaded and delivered, or

offered to be delivered to the consignee if to be found at such place as admits of their being safely taken into possession."

The foregoing language was quoted with approval in *United States vs. Union Stock Yards*, 226 U. S. 286-304. The Yard Company was performing the service of loading, unloading and delivering the live stock, and for that reason was in the last mentioned case held to be a common carrier and required to file and maintain tariffs covering its charges for its services.

The Yard Company could not be required to perform such service without compensation. *C. M. & St. P. Railway Company vs. Wisconsin*, 238 U. S. 491. Since the Yard Company was performing the service, it was entitled to compensation therefor and was required to file and maintain tariffs covering its charges. It is difficult to understand how it could be guilty of a wrong in collecting the charge from the party for whom the transportation service was rendered and also difficult to understand how the Director General could be guilty of a wrong in inserting the Yard Company's charges in the composite bill of the Yard Company and the line-haul carrier covering the freight and unloading charges, such bill specifically stating the 25c charge to be that of the Yard Company and assessed under its tariff.

The decision of the Court in *Covington Stock Yards Company vs. Keith*, 139 U. S. 128, much relied on by petitioners, does not indicate a contrary conclusion. In respect thereto, the Circuit Court of Appeals well said:

> "The action was begun in 1886—before the passage of the Interstate Commerce law—and of course, was uninfluenced by published tariffs of a participant in interstate commerce, as is the case with the Chicago Yards. The situation was entirely different and in our judgment, the case has little, if any, application here." (R. 395).

The Covington Yards were on the rails of the carrier. They were established and maintained pursuant to a contract with the carrier by which they were made the depot of the carrier for receipt and delivery of live stock. The carrier furnished no other yards in Covington and agreed that it would not do so and would not permit anyone else to do so. Keith, prior to the making of the contract, was maintaining a stock yards on the carrier's line in Covington with loading and unloading platforms, chutes, etc., through which it had been receiving and delivering stock. The carrier had torn up the platforms and connections, and refused to longer receive or deliver stock thereat. The Covington Yards were making a charge for yardage on all stock received by Keith through such yards and he brought suit to compel the carrier to receive and deliver stock to him through his own yards and without going through the Covington yards. The Court held that he was entitled to the relief sought either in the way of receiving and delivering at his own yards, or if delivered through the Covington yards without being charged for yardage. It will be noted, however, that the Covington yards were established for the sole purpose of performing the loading and unloading, watering and feeding of live stock transported to or from Covington by the carrier. No question of maintaining a market for live stock was involved. No question of delivery of the live stock beyond the premises of the carrier was involved. The Covington yards was not a common carrier. It was merely furnishing a facility the carrier was required to furnish under a contract with the carrier, and the Court held that the carrier could not directly or through its agent charge the shipper for the use of a facility it was required to furnish.

The case is further conclusively differentiated from the case at bar by reason of the fact that the Stock Yards in this case were not on the line-haul carrier's rails; that the yards were the destination of the shipments by reason of being

for sale on the public market maintained by the Yard Company; that the line-haul carriers had trackage rights over the rails of the Junction Company permitting them to reach the yards, but no right to go upon the premises of the Yard Company, either to unload or to make delivery.

When the cars reached the docks, the line-haul carriers could do nothing further in the transportation of the stock. They had reached the end of their lines, the point of connection with another common carrier furnishing the facilities necessary to complete the transportation, which included unloading and driving to the sales pens, for which service the Yard Company published and maintained its own tariffs and which service was performed by the Yard Company's crews entirely upon its own property devoted to the public use and to the performance of the service on account of which it was a common carrier and required to file tariffs of its charges.

Surely the Circuit Court of Appeals was right in holding the decision in the *Covington* case is without application to the case at bar.

Petitioners also cite and rely on *Panhandle & S. F. Railway Company vs. Phillips*, 197 S. W. 1031, and *Panhandle & S. F. Railway Company vs. Crawford*, 198 S. W. 1079, decided by the Court of Civil Appeals of Texas in 1917. The stock was delivered to Kansas City Stock Yards, and delay in feeding and delivery to consignee after unloading was involved. The Court relied on the *Covington* case. There was no suggestion that the Kansas City Yards was a common carrier. There is no intimation in the opinion in either case that it had published tariffs covering its charges or services. The Court does state that the record is silent in reference to who pays the Yard Company for its services. The Yards were on the rails of the Railway Company and there was nothing to differentiate it from the facts in the *Covington* case. Such

decisions, therefore, are not in point and can have no application to the facts presented in the case at bar.

V.

THE INCREASED CHARGE OF 25c PER CAR WAS COLLECTED FROM THE SHIPPER BY THE YARD COMPANY, AND THE CIRCUIT COURT OF APPEALS CORRECTLY SO HELD.

On page 26 of their brief, petitioners challenge the foregoing proposition, notwithstanding their petition expressly alleges that it did so, the Commission so found and the undisputed testimony clearly establishes such to be the fact. In their petition (R. 13), petitioners expressly allege

> "that the shippers and receivers of live stock, including plaintiffs, were compelled to and did pay the defendant, the Union Stock Yards and Transit Company * * * an amount in excess of the former tariff charge, etc."

It is true the Director General is included with the Yard Company in such allegation. In its first opinion the Commission found:

> "The Stock Yard Company collected and retained such charges from the shippers." (R. 123).

The undisputed facts are that when the Yard Company increased its charges, the line-haul carriers refused to increase their absorptions and the Yard Company, in pursuance of its effort to escape its obligation as a common carrier and probably to make itself popular with its customers, the shippers, tried to force the line-haul carriers to increase their absorptions by the amount of its increased charges, and thus save the shipper from paying same. The Yard Company went so far as to hold out 25c for each car it loaded or un-

loaded from the freight charges collected for the line-haul carriers.. They protested and began to make arrangements to collect their own charges. As a result, an understanding was reached. The line-haul carriers had always made out their freight bills and turned them over to the Yard Company to collect. It was arranged between the Yard Company and the line-haul carriers that in making out their bills thereafter, they would add 25c, specifying same as a loading or unloading charge, as the case might be, expressly stating that same was assessed under the Yard Company's tariff. As so made out, the Yard Company through Mr. Chace, its Auditor, collected the charge from the commission men who paid it out of the shipper's money.

This arrangement was reached before the beginning of Federal Control, and the practice was in effect when the Director General took charge, and was continued during that period. Such facts were before the Commission and it was on such facts the Commission made the holding above stated. Prior to the development of this controversy, the Yard Company had billed the line-haul carriers monthly for their charges covered by the absorption tariffs of the line-haul carriers. They continued to do so after the foregoing arrangement was made. Instead of holding out the 25c collected under its tariff in remitting the collections of the freight charges, thus increasing the bookkeeping, it remitted the entire amount to the line-haul carriers and included the amount in their bill to the line-haul carriers at the end of the month.

The Circuit Court of Appeals rightly held under such facts that the charges were collected by the Yard Company. There is no dispute as to the facts, and we think both the Commission and the Court have placed the only logical construction thereon that seems possible. Adding the Yard Company's charge to the line-haul carriers' freight bill, expressly specifying that it was assessed under the Yard Company's tariff,

did not make such charge a part of the line-haul carriers' freight bill, but made the freight bill presented a composite bill including the charges of the line-haul carriers and the delivering carrier, (Yard Company). The Yard Company was bound to collect its tariff charges. It matters not that it was forced to do so by the refusal of the line-haul carriers to permit it to take their money to pay same. By being thus forced, it avoided a violation of the law both by itself and the shippers. The Yard Company accomplished such collection by procuring the line-haul carriers to insert the extra 25c charge the shippers were required to pay on their freight bills containing the express statement that they were charges assessed under the Yard Company's tariff for loading and unloading, and after the bills were so made up, the Yard Company actually collected the money from the commission men who paid it out of the shippers' funds in their possession.

VI.

THE MAKING AND COLLECTING OF A SEPARATE CHARGE FOR THE SERVICE OF THE YARD COMPANY IN LOADING AND UNLOADING THE LIVESTOCK WAS NOT AN UNLAWFUL OR UNREASONABLE PRACTICE AND SUCH FINDING OF THE COMMISSION IS WITHOUT SUPPORT IN THE EVIDENCE AND IS CONTRARY TO THE EVIDENCE AND ALSO CONTRARY TO LAW.

In its second opinion, 58 I. C. C. 164, (R. 145), the Commission announced its conclusion upon which the award sued on was made. Such conclusion is:

> "As the services of unloading and loading are part of the transportation of live stock, the collection of separate charges from the shippers for unloading or loading, in addition to the rates on live stock from and to interstate points to and from the stock yards was an unlawful and unreasonable practice."

It will be recalled the Commission at no time considered either the reasonableness of the Yard Company's charge or of the line-haul rate, nor the reasonableness of the sum of such rates, but based its conclusion upon the fact that the service of unloading and loading is a part of the transportation of live stock. A purely legal question is thus presented.

The entire charge for transporting the live stock from point of origin to destination in the Yards is made up of the line-haul rate and of the Yard Company's charge for its common carrier service. The charge of the line-haul carriers is stated separately from that of the Yard Company and in their own tariffs. The question presented is whether it is unlawful to so state the charges; that is, whether the charge of the Yard Company can lawfully be stated separately from the charge of the line-haul carriers. Paragraph 6, Section 1 of the Act to Regulate Commerce, (49 U. S. C. A., Section 1, Paragraph 6, page 12), in substance provides that it is the duty of all common carriers subject to the Act to establish and enforce just and reasonable classifications with reference to which rates, tariffs, regulations or practices are or may be made or prescribed, and just and reasonable regulations affecting classifications, rates, tariffs, issuance, form and substance of tickets, receipts and bills of lading, etc.

Paragraph 7, Section 6 of the Act to Regulate Commerce, (49 U. S. C. A., Section 6, Paragraph 7, page 238), provides in substance that no carrier shall engage or participate in transportation of passengers or property unless the rates, fares and charges applicable have been filed and published in accordance with the provisions of the Act, and further provides that no carrier shall charge, demand, collect or receive a greater, less or different compensation for its services, and further that no carrier shall refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privilege or facility except such as are specified in

its tariffs. Paragraph 1 of Section 6 of the Act to Regulate Commerce, (49 U. S. C. A., Section 6, Paragraph 1, pages 240-241, appendix 130) provides:

> "The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried and shall contain the classification of freight in force, *and shall also state separately all terminal charges*, storage charges, icing charges and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise shall affect or determine any part or the aggregate of such aforesaid rates, fares and charges or the value of the service rendered to the passenger, shipper or consignee." (Italics ours).

In view of this provision, even in cases where place of delivery is on the line-haul carrier's rails, the stating of the terminal charges separately is not only permitted, but required. In cases, however, where the terminal services are performed by an independent common carrier not a participant in the line-haul carrier's tariffs, the stating of the charge separately is indispensable and is necessary in order that the carrier may receive compensation for its service, and in fact, in order that it may perform the service at all, since the provisions of the Commerce Act above referred to provide that the carrier shall not participate in the transportation unless and until its tariffs fixing its charges have been filed with the Commission. Having been filed, it is just as essential that the tariffs be enforced.

Such conclusion is indicated in the opinion of the Court in *Interstate Commerce Commission vs. C. B. & Q. R. R. Co.*, 186 U. S. 320. This case was in reference to the $2.00 terminal charge in effect at the time the shipments in controversy were made and which formed a part of the through rate from point of origin to the docks of the Yard Company.

Prior to 1894, the line-haul rate had included transporta-

tion to the Yards, but in that year because of the imposing of a trackage charge by the Junction Company for use of its tracks, the line-haul carriers established a $2.00 terminal charge in addition to their line-haul rates. The validity of such separate terminal charge was litigated by a shipper in a suit against the Atchison, Topeka & Santa Fe Railway Company to require it to deliver shipments of live stock at the Yards without making such separate charge. The Circuit Court in 64 Fed. 992, relying on its construction of *Covington Stock Yards vs. Keith,* 139 U. S. 128, granted the relief prayed for. The Circuit Court of Appeals, however, in 73 Fed. 753, reversed the Circuit Court, holding that it was proper to make the charge and to state the terminal charge separately. The matter thereafter came before the Interstate Commerce Commission on complaint of shippers, and the Commission, while finding the $2.00 terminal charge considered by itself reasonable and that the line-haul rate considered by itself was reasonable, ordered the carriers to modify their tariffs and to collect not to exceed $1.00 for the terminal charge. The question before the Supreme Court was the validity of such order. In its opinion the Supreme Court considers the question presented very fully, and same should be read at length.

As a result of such consideration, the judgment of the lower Court setting aside the order of the Commission was affirmed, thus upholding the separate terminal charge.

The matter was again before the Commission and it made a further order of like character which the Court again set aside in *Interstate Commerce Commission vs. Stickney,* 215 U. S. 98-104-105. In stating the case the Court said:

> "The controversy as to this terminal charge has been of long duration. A history of it antecedent to the present litigation is to be found in *Interstate Commerce Commission vs. C. B. & Q. R. R. Company,* 186 U. S. 320.
>
> "It is well to understand the precise question which is presented in this case. That question is the validity of

the terminal charge of two dollars per car. The report of the commission opens with this statement: 'The subject of this complaint is the so-called terminal charge of $2 per car imposed by the defendants for the delivery of carloads of livestock at the Union Stock Yards in Chicago,' and its order was in terms that the railroad companies be—'required to cease and desist on or before the 1st day of February, 1908, from exacting for the delivery of live stock at the Union Stock Yards, in Chicago, Ill., with respect to shipments of live stock transported by them from points outside of that State, their present terminal charge of $2 per car.'"

The Court further quotes from the Commission's order directing that after February 1, 1908, the terminal charge should not exceed $1.00 per car. The Court further said:

"The sixth section of the act known as the 'Hepburn Act,' (an act to amend the Interstate Commerce Act, passed on June 29, 1906, c. 3591, 34 Stat. 584), requires carriers to file with the commission and print and keep open to inspection schedules showing, among other things, 'separately all terminal charges * * * and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates.' By Section 15 the commission is authorized and required, upon a complaint, to inquire and determine what would be a just and reasonable rate or rates, charge or charges. This, of course, includes all charges, and the carrier is entitled to have a finding that any particular charge is unreasonable and unjust before it is required to change such charge. For services that it may render or procure to be rendered off its own line, or outside the mere matter of transportation over its line, it may charge and receive compensation. *Southern Railway Co. vs. St. Louis Hay Co.*, 214 U. S. 297. If the terminal charge be in and of itself just and reasonable, it cannot be condemned or the carrier required to change it on the ground that it, taken with prior charges of transportation over the lines of the carrier or of connecting carriers, makes the total charge to the shipper unreasonable. That which must be corrected and condemned is not the just and reasonable terminal charge, but those

prior charges which must of themselves be unreasonable in order to make the aggregate of the charge from the point of shipment to that of delivery unreasonable and unjust. In order to avail itself of the benefit of this rule the carrier must separately state its terminal or other special charge complained of, for if many matters are lumped in a single charge it is impossible for either shipper or commission to determine how much of the lump charge is for the terminal or special services. *The carrier is under no obligations to charge for terminal services.* Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and commission that it is insisting upon it."

The Commission in its opinion found that the terminal charge in itself was reasonable and also that the line-haul charge was reasonable, but still directed a reduction of the terminal charge from $2.00 to $1.00. In setting the order of the Commission aside, this Court on page 109 of the report said:

"Under those circumstances it seems impossible to avoid the conclusion that, considered of and by itself, the terminal charge of two dollars a car was reasonable. If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards it would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced the Union Stock Yards Company will suffer loss while the real wrongdoers will escape. It may be that it is more convenient for the commission to strike at the terminal charge, but the convenience of commission or court is not the measure of justice."

In the case at bar, there is no charge that either the line-haul carriers' rates were unreasonable or that the Yard Company's charge was unreasonable; nor any claim that the sum of such rates was unreasonable. The presumption must ob-

tain, therefore, that both were reasonable. If, however, the sum of such rates was unreasonable, the Commission could not correct the situation without investigating and determining that one factor or the other was unreasonable and should be reduced. The Commission could not, as a matter of "convenience," strike at the situation generally, and without determining or attempting to determine which carrier was charging more than it should, merely denounce the practice of charging the shipper separately for the unloading service.

In view of the language of the statute, it was proper to state the terminal charge separately, especially when the particular terminal charge involved was the only charge made by the common carrier performing the service covered by the charge. If the charge when stated separately, as required by the Act, was reasonable, it must be upheld by the Commission and the Court. Since its reasonableness is not attacked, the presumption is that it was reasonable and the Commission, in holding that the making of the separate charge was unlawful and unreasonable, committed an error of law which this Court must correct.

Where the terminal charges and the line-haul charges are stated separately, if the aggregate is unreasonable, the reduction must be in the factor making up the through rate which is unreasonable. Neither factor can be determined to be unreasonable, unless evidence is produced supporting such conclusion. The Commission, however, refers to the making and collecting of this separate charge as a "practice" which the Commission says is unreasonable and unlawful. Certainly a practice of complying with the law in stating the terminal charge separately and collecting the charge when provided for in tariffs is not unlawful. It is thus seen that where the terminal service is on the line of the line-haul carrier, it may charge therefor and may state the charge separately, and if it does charge for the terminal service, it *must* state such charge separately.

In the case at bar, however, we have connecting carriers, the line-haul carriers with their separate tariffs and separate charges covering transportation from point of origin in the country to the Yards. We also have separate tariff of the Yard Company, a separate and distinct common carrier covering its charges for the service it performs and for the use of its instrumentalities and facilities devoted to public use. Each tariff is for the service performed and the facilities furnished by the carrier filing the tariff. The tariff of neither covers any part of the service of the other. It is not the case of a joint tariff or a joint service, but of separate and distinct tariffs filed with and approved by the Commission, and covering the separate services and separate charges of each, and in neither case is the charge assailed as being unreasonable. It must be apparent the conclusion of the Commission is supported by neither fact nor law, that its conclusion is not supported by the evidence and constitutes an error of law which must be corrected by the Court.

VII.

NEITHER THE EFFORTS OF THE YARD COMPANY TO FORCE THE LINE-HAUL CARRIERS TO PAY ITS INCREASED CHARGE BY INSERTING IN PARENTHESES IN ITS TARIFF THE WORDS, "AS A CARRIER'S AGENT," NOR ITS ALLEGED ADMISSIONS CAN CREATE AN OBLIGATION ON THE LINE-HAUL CARRIERS TO PAY SUCH CHARGE OR CREATE A LIABILITY ON THEIR PART FOR THE COLLECTION OF SUCH CHARGES BY THE YARD COMPANY.

On pages 65 to 70 of petitioners' brief, it is urged that the Yard Company admits that it was the line-haul carriers' agent, and further urged that the record shows such agency. For such contention, petitioners rely on the words, "as a carrier's

agent," in parentheses in the Yard Company's tariff increasing its charges and the statements of officers of the Yard Company and its attorney in the course of the hearing. In the statements relied upon which are merely in the nature of admissions without testifying to any fact, petitioners omit the affirmative testimony both of Mr. Henkle, General Manager of the Yard Company, and Mr. Chace, Auditor of the Yard Company, that there was no contract between the Yard Company and the carriers respecting the loading and unloading of live stock, and that the tariff was filed without the consent or authority of the line-haul carriers, and omit reference to the testimony of the carriers that no such agency or authority existed. This testimony has already been definitely pointed out under Division I, Paragraph B, to which reference is made.

We know of no theory by which a common carrier by its own action, through a tariff or otherwise, may create a duty, obligation or liability upon another common carrier. We have already pointed out that the Yard Company filed its tariff without consent or authority of the line-haul carriers. They immediately protested against the idea that the Yard Company was their agent in filing the tariff or in performing its common carrier service. They refused to increase their absorptions and refused to pay the increased charge.

Unless we are to abandon the old-fashioned doctrine that the relation of principal and agent cannot be created by the mere act of the agent, we must conclude petitioners' contention is unsound. An agency can only be created through an agreement between the principal and agent, and the agency can extend only to those things covered by the agreement. Here there was no agreement. When the Yard Company pretended to be their agent, the line-haul carriers protested and petitioners were apprised of such protest and knew the alleged agency was unauthorized.

When the Director General took over the railroads, the

petitioners had for six months been paying the increased charge to the Yard Company from their shippers' funds. When the Director General came into the picture, the practice of placing the increased charge of 25c in the freight bills with specific reference to same being assessed under the Yard Company's tariff had long been established, and he continued such practice. The alleged agency had not only been repudiated by the corporate line-haul carriers, but they with the Yard Company had for six months been ignoring the thought of agency. The composite bill of the line-haul carriers and the Yard Company was paid in one check to the Yard Company. The absorption tariffs of the line-haul carriers provided for paying 25c of the unloading charge to the Yard Company. It had never been the practice of the Yard Company to withhold such amount from the collections for the line-haul carriers, but on the contrary, the entire collections were remitted weekly, and monthly bills were rendered by the Yard Company for the amount to which it was entitled. This was a bookkeeping convenience and was a practice not covered by any express agreement, but acquiesced in by the parties.

After the increased charge was included in the composite bill of the line-haul carriers and the Yard Company, the practice was continued of remitting the entire collection and presenting monthly bills for the entire amount the Yard Company was entitled to. This practice was in effect when the Director General took charge and was continued.

Any thought of agency based on the tariff or otherwise was being ignored long before the Director General came into the picture and was continued to be ignored during all of the time involved in this suit. The method of handling the funds after the collection was made by the Yard Company was a matter between the Yard Company and the Director General and did not affect the relation of either to the shipper or to petitioners. The methods adopted by which the Yard

Company ultimately received its entire charge do not create any liability on the part of either the Director General or the Yard Company to petitioners or to the shippers.

In view of the fact that the provisions of the Act to Regulate Commerce, to which reference has been made in other divisions hereof, required a carrier to file tariffs of its charges before participating in transportation, and to enforce its tariffs after being filed, it is difficult to understand how the unauthorized insertion of the words, "as a carrier's agent" could excuse the Yard Company from collecting its charge or the party for whom its service was performed from paying such charge. In view of the law, it would seem such language would be treated as surplusage.

The words "as a carrier's agent" have been shown to be a misstatement of fact. Such misstatement of fact should not invalidate the tariff and certainly should not create a liability on the line-haul carriers. The line-haul carriers did not permit such misstatement to go unchallenged, but at once repudiated the same, and long before Federal control, shippers knew of such repudiation and were paying the charges to the Yard Company. If the shippers were damaged by the misstatement, their remedy, if any, would be against the party committing the wrong. They were not, however, damaged or affected by such misstatement in respect to any shipment in controversy. They knew of the misstatement long before any shipment in controversy was made. They did not rely on such statement in making any shipment in controversy. The shippers paid for a service rendered in their behalf the same amount they would have been required to pay for such service if the words "as a carrier's agent" had not been included in the tariff.

Such language did not authorize shippers to understand the charge was imposed upon the line-haul carriers. The inference to be drawn from such language, had it not been challenged, was that the charge was being imposed on the

shipper by the Yard Company acting as agent of the line-haul carriers; i. e., the tariff was really a tariff of the line-haul carriers published by the Yard Company as their agent. Since the Yard Company did not act as agent of the line-haul carriers, either in publishing the tariff or in enforcing it by collecting the charges imposed by it, such language could impose no liability on the line-haul carriers or the Director General. That consent of all carriers who are to be governed by a tariff is necessary, is shown by the provisions of Section 6, Paragraph 4 of the Act to Regulate Commerce (49 U. S. C. A., Section 6, Paragraph 4, page 281, Appendix 131) which provides:

> "The names of the several carriers which are parties to any joint tariff shall be specified therein and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof, as may be required or approved by the commission * * *."

We have already shown that the tariff of the Yard Company names no carrier except itself; that the files of the Commission show no concurrence therein by any line-haul carrier. The tariff can, therefore, affect only the Yard Company and the persons for whom it renders the transportation service for which its charges are made. Tariffs, we think, are authorized only for the purpose of fixing the duties and obligations of the carrier filing the same, of other carriers who join therein in the manner provided by the Act to Regulate Commerce and the shippers utilizing the services and facilities covered thereby.

Such was the thought of the Commission, we think, in its proceeding against the Yard Company to require it to file its tariffs and of the Court in making such requirement. In complying with the Court's order, the Yard Company filed its tariff without any suggestion of agency. In increasing its charges, such suggestion was for the first and only time con-

tained in a tariff of the Yard Company. Its status as a common carrier had not changed in the meantime. Its relations with the line-haul carriers had not changed in the meantime. Its relations with the shippers had not changed. The misstatement in its tariff was unauthorized by the law, unauthorized by the Commission and unauthorized by the line-haul carriers, and became and was mere surplusage. If such is not the case, the consequences must rest on the Yard Company, who attempted the unauthorized thing, and not on the line-haul carriers who neither participated therein nor profited thereby.

VIII.

CONGRESS DID NOT CONSENT THAT THE AGENT APPOINTED BY THE PRESIDENT MIGHT BE PROCEEDED AGAINST BEFORE THE INTERSTATE COMMERCE COMMISSION FOR A TORT, BUT ONLY FOR DAMAGE RESULTING FROM THE "COLLECTION OR ENFORCEMENT BY OR THROUGH THE PRESIDENT DURING THE PERIOD OF FEDERAL CONTROL OF RATES, FARES, CHARGES, REGULATIONS AND PRACTICES."

On page 19 of petitioners' brief, at the very beginning of their argument, they state:

> "The underlying fundamental proposition in this case is that it is an action in tort brought against respondents as joint tort-feasors, etc."

This is a proceeding against the United States. Such proceedings may be brought only because of and strictly in accordance with the consent of Congress. (*Davis, Agt. vs. Donovan*, 265 U. S. 257-263). The only consent to proceed against the Agent appointed under Section 206-A, Transportation

Act of 1920 before the Interstate Commerce Commission is contained in Paragraph C of such Section, (49 U. S. C. A., Section 74, page 357). Such provision is as follows:

> "Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations or practices (including those applicable to interstate, foreign or intrastate traffic) which were unjust, unreasonable, unjustifiably discriminatory or unreasonably prejudicial, or otherwise, in violation of Chapter 1 of this title may be filed with the Commission within one year, etc."

In order to be within the jurisdiction of the Commission and within the consent of Congress, the complaint must be on account of "the collection or enforcement of rates, fares, charges, regulations or practices" by the Director General. The charge involved here was one imposed under a tariff of the Yard Company in which no railroad under Federal control participated. The Yard Company was not under Federal control. It was the Yard Company's tariff and the Yard Company collected the charge. That the charge was collected pursuant to the Yard Company's tariff, there can be no question. The Yard Company sought to withdrawn its tariff, but the Commission refused to permit it to do so and forced it to continued the tariff in effect. C. C. Chace, Auditor of the Yard Company, testified:

> "Q. Do you know under what authority the loading and unloading charges were collected or assessed?
> A. On the authority of the Stock Yards tariff." (Defendant's Exhibit 9, page 181).

General Manager Henkle of the Yard Company testified that if the Commission would permit the Yard Company to cancel its tariff containing the charge complained of, the

Yard Company would cease collecting same from the shipper. (Defendant's Exhibit 6, page 342).

The real purpose of the Commission, as we understand, although not directly stated in its opinion, was to require the Director General to absorb the increase in the Yard Company's charges. We are treating this subject under another division and at this time merely wish to point out that the statute did not authorize the filing of a complaint with the Commission after Federal control ended on account of the failure of the Director General to do something during Federal control, but only because of the collection or enforcement of rates, fares, charges, regulations or practices.

The failure to increase the absorptions of the line-haul carriers was not the enforcement of a practice, nor was it the collection of a rate. The Director General did not collect a rate at all; did not establish the rate complained of. He merely refused to increase an absorption. The Yard Company established the rate, collected it and retained it as compensation for a service which it rendered, the value of which is not questioned; nor is it contended that the Yard Company was not entitled to compensation for what it did. Congress never intended to give the Commission authority after Federal control ended to sit in judgment and award damages because of the thousand and one things which the Director General might have done, but in his wisdom and judgment did not do. Authority to impose liabilities on the Government for torts committed by the Director General was not given to the Interstate Commerce Commission. Petitioners contend the Director General was a joint tortfeasor. Whether because he did not increase his absorptions or because of participating in making the bill which the Yard Company collected, is not clear. That the Director General did not collect the charge and did not receive the benefit of it is found by the Commission in its first opinion from which it has never receded. The language of such finding is:

"The Stock Yard Company collected and retained such charges from the shippers." (R. 123).

If the failure to increase his absorptions is not a tort for which the Agent may be held in a proceeding before the Commission, then if there is any liability on the theory of a tort, it is participating in the making out of the bill for the freight charges in which was inserted the 25c additional charge of the Yard Company with a specific reference in the bill to the Yard Company's tariff and statement that the charge is made under such tariff. The making out of the bill was the only act in which both the Yard Company and the Director General participated. There was no joint participation in failure to increase absorptions. The Yard Company was attempting to force an increase in the absorptions and the Director General refused to do so. The joint tort, therefore, if any, must be in respect to the making out of the bill covering the charges. No complaint is made of the freight charge, and we must therefore assume that the putting of the additional 25c charge for unloading on the bill and the collecting of it constitutes the alleged joint tort. In that sense, the Director General assisted in the collection by the Yard Company, but such assistance is not an act for which the Commission was given jurisdiction to impose a liability on the Director General. Whichever view may be taken, the Commission was without jurisdiction to make the award against the Director General and its action in attempting to do so is absolutely void.

IX.

THE ABSORPTION TARIFFS OF THE LINE-HAUL CARRIERS FURNISHED THE MEASURE OF THEIR OBLIGATION AND LEGAL RIGHT TO CONTRIBUTE TO THE PAYMENT OF THE YARD COMPANY'S CHARGES.

What we have said under Divisions IV and VI hereof as to duty to file and strictly abide by tariffs is equally applicable here. We call special attention, however, to Paragraph 6 of Section 1 and Paragraph 7 of Section 6 of the Act to Regulate Commerce, (49 U. S. C. A., Section 1, Paragraph 6, page 12; and Paragraph 7, Section 6, page 237, appendix 130, 131), which require carriers subject to the Act to *establish, observe and enforce* classifications of property for transportation with reference to which rates are established, and to provide therein rules and regulations applicable to and the form and substance of tickets and shipping contracts, and which prohibit the engaging in transportation until such classifications and tariffs are filed, and which require all concessions to shippers to be expressly stated therein.

For convenience we again quote such paragraphs:

> "It is made the duty of all common carriers, subject to the provisions of this Act, to establish, observe and enforce just and reasonable classifications of property for transportation with reference to which rates, tariffs, regulations or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates or tariffs, the issuance, form and substance of tickets, receipts and bills of lading * * * etc." (Section 1, Paragraph 6, appendix 130).

> "No carrier * * * shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provi-

sions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the tariffs filed and in effect at the time; *nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privilege or facilities in the transportation of passengers or property, except such as are specified in such tariffs.*" (Section 6, Paragraph 7 appendix 131. Italics ours).

Pursuant to such provisions, the line-haul carriers filed their tariffs fixing their rates for transportation, which limited the transportation to the carrier's own line with delivery to a connecting carrier if destined beyond the line of the originating carrier. Unless a provision is contained in the tariffs authorizing the absorbing of the rate in whole or in part of the connecting carrier, the originating carrier would not have a legal right to do so. In order to absorb a switching charge, an unloading charge, or any other charge of a connecting carrier or other agency, the tariffs of the carrier must expressly provide therefor.

The concluding language of Paragraph 7 of Section 6, which we have italicized, can have no other meaning. The line-haul carriers, therefore, could not relieve the shipper of the duty of paying the increased charge of the Yard Company without providing in their absorption tariffs that they would do so. They were not permitted to collect a charge not provided for in their tariffs, nor were they permitted to refund to the shipper any part of the tariff charge unless specified in the tariffs. To pay the Yard Company for its services anything in excess of that provided in their absorption tariffs would be a violation of the Act. If the Commission had found that the rates were high enough to warrant absorbing the increase charge and that discrimination

would result on a failure to absorb it, the Commission had authority to direct the carriers to increase their absorptions 25c per car (assuming jurisdiction had been obtained by a full compliance with the statute), and in such event to authorize reparation in reference to past transactions, but the Commission did not attempt to authorize an increase in the absorptions.

This is conceded by petitioners on page 25 of their brief, where they state:

> "The question as to whether line-haul carriers should have absorbed the increased charges of the Yard Company is not involved."

Without considering the question of whether absorptions should have been increased, the Commission merely condemned the collection of the increased charge as an unreasonable and unlawful practice and undertook to order reparation against both the Yard Company and the line-haul carriers without determining that the Yard Company was not entitled to compensation for its service and without determining that the line-haul carriers should increase their absorptions.

In view of the fact that the Yard Company was obliged to enforce its tariff and collect its charges, that no finding of unreasonableness and no direction or permission to the Yard Company to cancel its charges were made or given, that the line-haul carriers were obliged to abide by their tariff provisions and could not increase their absorptions without amending their tariffs, that the Commission did not direct an amendment to their tariffs to increase absorptions and could not do so under the evidence, the making and collection of the charge was neither unreasonable nor unlawful, was not a practice, but the enforcement of the tariff which the Yard Company was legally bound to enforce. The situ-

ation, therefore, furnished no basis for the Commission's award and same must be set aside by the Court.

X.

THE DECISION OF THE DISTRICT COURT THAT THESE PETITIONERS HAD NO RIGHT TO MAINTAIN THIS ACTION WAS CORRECT.

The Interstate Commerce Commission has filed a brief as *amicus curiae* and seeks to have this court review the decision—not of the Court of Appeals—but that of the District Court notwithstanding that in view of the action of the Court of Appeals these petitioners were in no way prejudiced by said decision of the District Court.

Assuming, however, that this court may, nevertheless, determine to review the decision of the District Court, we beg to submit that under the evidence and under the decisions of this court, said decision was justified.

The decision of the District Court was based on the proposition that the petitioners—plaintiffs below—(hereinafter referred to as plaintiffs) had failed to show that the alleged wrongful act of the respondents—defendants below—(hereinafter referred to as defendants) had subjected them to any pecuniary loss. On the contrary the undisputed evidence affirmatively showed that no such loss had been incurred by them. The suit was to recover damages for an alleged tort. Its purpose was to compensate plaintiffs for an alleged loss suffered by them—to be made whole—for an alleged unlawful exaction of a charge for services rendered by defendants in *completing the transportation of live stock.* That is, for moving said live stock from the cars across the platforms

and through the yards into the proper pens for delivery. (1)

As heretofore stated, the plaintiffs were 103 live stock commission men located at the Union Stock yards, Chicago; they were the consignees of shipments of live stock which they sold on commission and when sold remitted the proceeds of sale to the consignors after deducting various charges, among others, the charge in question—thereby making themselves whole for the charges so advanced to the defendants. (Opinion of the Commission R. 151).

The sole question presented is—Can a consignee who pays an unlawful charge to the carrier out of the funds of the consignor, or who before complaint made has been fully reimbursed by the consignor for such outlay, recover from the carrier in his own right the amount so paid by him?

The Interstate Commerce Commission has held that he may recover and the District Court held he could not.

Mo. Portland Cement Co. vs. Director General, 88 I. C. C. 492.
Adams & Kitchen, et al v. Mellon, 39 Fed. (2d) 80.

The order of the Commission is dated December 12, 1927, and is as follows:

> "It appearing, That on February 11, 1919, the Commission entered its report, and on July 15, 1920, and June 2, 1925, its reports on further hearings in the above entitled proceedings, which reports are hereby referred to and made a part hereof, and these proceedings now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing,

(1) The order of the Commission is based on its finding of law that the unloading charge was an additional charge to that for transportation, and hence, unlawful, yet it held that the service of unloading was a transportation service (58 I. C. C. 167)—the transportation not having ended until the live stock were placed in the proper pens. (Covington Stock Yds. v. Keith, 129 U. S. 126; U. S. v. Union Stock Yds. 226 U. S. 286). If the service was a transportation service, the charge was a transportation charge and was a component part of the through transportation charge (rate) and not a separate charge therefrom and hence was not unlawful for the reasons stated by the Commission.

among other things, the dates on which payment of the charges assailed was made; we find that complainants shown in the following table are entitled to awards of reparation from the defendants named below in the amounts set opposite their respective names, with interest." (R. 157-158).

(Then follows a long list naming the plaintiffs in the District Court with the amounts set opposite their respective names.)

Then follows:

"It Is Therefore Ordered, That the defendants named in each of the groups shown in the above table be, and they are hereby, authorized and directed to pay unto the complainants shown opposite said groups, on or before January 26th, 1928, the amounts set opposite their respective names in said table, with interest thereon at the rate of six per cent per annum from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of the unlawful collection of separate charges, in addition to the line haul rates, for loading and unloading of interstate shipments of ordinary live stock, in carloads, at the Chicago Stock Yards." (R. 208).

Paragraph 2 of the plaintiffs' petition filed in the District Court is as follows:

"The following named plaintiffs are, and each of them is, named in an order of the Interstate Commerce Commission entered the 12th day of December, 1927, as being entitled to receive from the defendants hereinafter named the amounts respectively set forth in said order of the Commission, a copy of which is hereto attached as Exhibit "A", and made a part hereof to the same extent and as fully as though the same were here set out; the following named are the plaintiffs herein and *are the parties entitled to receive the damages awarded by the Interstate Commerce Commission.*" (R. 4). (Italics ours).

(Then follows the names of the parties contained in the order of the Commission.) (R. 4).

In their brief filed in this court, the following statement is made:

> "Petitioners brought suit as plaintiffs in the District Court to recover damages on a claim predicated on an order of the Interstate Commerce Commission awarding reparation in the sum of $140,001.25 *in favor of petitioners* and against the Director General of Railroads of the United States and the Union Stock Yard & Transit Co. jointly and severally." (Br. 2-3) (Italics ours).

That the award was made to the plaintiffs in their own right not only appears from the language of the order, but that it was so understood by counsel for plaintiffs is shown from the foregoing extracts from their petition in the District Court and brief filed in this court.

In the Commission's report of June 2, 1925, the following statement is made:

> "While it is admitted that in each and every instance the charge which was paid by the commission merchant was subsequently charged back and collected from the consignors, *this would not affect the right of the complainant consignees to awards of reparation.*" (R. 151). (Italics ours).

It is true that in this same paragraph the Commission also said:

> "They (commissionmen) seek reimbursement in their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers *and also as factors and agents for and on behalf of the live stock shippers who were the consignors.*" (R. 151). (Italics ours).

In view of the foregoing finding had the Commission seen fit to do so it might have made the award to the complainants in their representative capacity as factors and

agents of the consignors, but in the order on which the suit was based no mention is made of the consignors, nor was it stated in said order that the defendants were to pay the award to—or that the complainants were to receive—the payments in any representative capacity. The Commission could not make the award to the plaintiffs in their own right and also in their representative capacity. It had to be made to them either in their own right or as representatives of the shippers.

Even after the order was made had the complainants desired to have the award made to them in their representative capacity, the Commission undoubtedly upon request would have so amended the order, but in view of what the Commission had said in its report of June 2, 1925 that the fact that complainants had been reimbursed by the shippers for the money advanced by the commission men in paying said charges "would not affect their right to awards of reparation", and the complainants, therefore, were willing to accept the award as made, relying on the correctness of the doctrine announced by the Commission in the *Missouri Portlant Cement* case, *supra.*

The complainants further relying on the correctness of that principle brought suit in their own individual names and right in the District Court. That court in its opinion saying:

> "The plaintiffs are 103 commission men, members of the Chicago Live Stock Exchange. The action is brought in their individual names. It is not, and does not purport to be, brought in any representative capacity. The plaintiffs do not sue as assignees as was done in the case of *Spiller vs. A. T. & S. F. Ry. Co.*, 253 U. S. 117, 64 L. Ed. 810." (R. 66).

That the Commission in making this award to the plaintiffs in their own right did so under the doctrine announced in their decision in the *Missouri Portland Cement* case,

supra, is clearly shown from the following statement of Commissioner Hall found in the report of the Commission of June 2, 1925, 100 I. C. C. 266, viz.:

Hall, Commissioner, concurring:

> "I join in the award of reparation to those complainants only as constrained thereto by the decision of the majority in *Missouri Portland Cement Co. v. Director General*, 88 I. C. C. 492, and am authorized by Commissioners Esch, Lewis and Cox to say that their participation in the award is under the same constraint." (R. 147, 156).

That counsel for plaintiffs understood that the order of the Commission ran to the plaintiffs in their own names and right is indicated by the following answers he made on the hearing before the Commission, viz.: in response to an inquiry of Mr. Towner, representing the Stockyard Co. directed to Mr. Hillyer, counsel for complainants, appears the following: (Defendant's Exhibit 9, page 236):

> "I had better correct your impression of that right of agency, Mr. Towner, because that is not the basis of our case at all. The basis of our case is that these people have a legal right to collect this money under the decisions of the Commission and the courts, and that it is not necessary for them to disclose here what they are going to do with it after they get it."

Mr. Towner replied to such statement:

> "Is it your theory, for my information, that these complainants would have the legal right not only to recover reparation, but to retain it?"

And Mr. Hillyer answered "Yes".

On the trial of said case and at the conclusion of all the evidence, a motion for a directed verdict having been made, the District Judge stated:

"It is apparent that the plaintiffs, commissionmen, have no legal interest in this proceeding. They are purely volunteers. They have adopted themselves as convenient agents to secure the recovery. They are not the ones who have been damnified by the imposition and collection of the excessive charge. The court holds that the plaintiffs in said case cannot maintain this motion (action). It must follow, and it is the ruling of the court, that the motions to direct a verdict made by the defendant; Andrew W. Mellon, Director General as Agent, etc. and a similar motion made by the Union Stockyard & Transit Co., defendants, be and each of them is allowed. The court will instruct the jury to find the issues for the defendants." (R. 77).

In the course of its opinion the Court of Appeals said:

"The action does not purport to be brought by appellants otherwise than in their respective individual capacities. Indeed, with attention directly challenged to their right to sue, it was contended by their counsel that they had such right, and while most likely the shippers would have the benefit of any recovery, this was wholly within appellants' volition." (R. 394).

The Court of Appeals further said:

"In the District Court's opinion Judge Woodward discusses the Interstate Commerce Commission decisions, and many others, particularly *Southern Pac. Co. vs. Darnell-Taenzer*, 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451, and *Louisville & N. R. Co. vs. Sloss-Sheffield*, 269 U. S. 217, 46 S. Ct. 73, 70 L. Ed. 242, reaching the conclusion that appellants in their own right may not maintain the suit.

Our examination of this question does not so entirely satisfy us of the correctness of the District Court's conclusion thereon as to justify our deciding the appeal upon ground so formal and technical, if a proper result may be reached upon the merits of the cause.

In considering appellants' motion made after judgment had been entered, for reopening the case and permitting amendment to be made to the declaration to the end that the plaintiffs may maintain the action as trustees for the various shippers, evidently the ground upon which the court had directed the verdict was again questioned. The court then said: 'While the court, in its opinion, did not advert to the other points argued by the defendants, yet it seems to the court that on other grounds, not referred to in the opinion, the judgment of the court may be maintained.' In our view of the case, there are other grounds on which the judgment may be rested.

It would greatly transcend the reasonable scope of such an opinion to present discussion of all of the many propositions put forward by the parties in the 700 printed pages of briefs and arguments submitted to us. Our further comments will relate to the merits of the reparation claims, *without regard to the right of appellants to maintain the action therefor.*" (Italics ours).

Only Error Which May Have Resulted in Prejudice can Justify Reversal of a Judgment.

Camp vs. Gress, 250 U. S. 308, 317.
Y. & M. V. Ry. vs. Mullins, 249 U. S. 531.

The Court of Appeals after referring to the statement of the District Court that its judgment might have been maintained on other grounds presented by defendants, concurring therein, proceeds to consider the case on its merits without regard to the right of the plaintiffs to maintain the atcion, thereby in effect overruling the grounds upon which the action of the District Court was based. Hence, we are unable to see how the plaintiffs, petitioners here, were prejudiced by the reasons given by the District Court in reaching its decision.

In *Yazoo & M. V. R. Co. vs. Mullins*, 249 U. S. 531, 532-533, this court said:

"It is true generally in cases coming from lower federal courts that the rendering of an erroneous decision on a particular question, *Fidelity & Deposit Co. vs. Courtney*, 186 U. S. 342, 351; *West vs. Camden*, 135 U. S. 507, 521; or the assignment by the lower court of an erroneous reason for a right decision; *Seaboard Air Line Railway vs. Moore*, 228 U. S. 433, 435; *United States vs. One Distillery*, 174 U. S. 149, 151; will not entitle the complaining party to reversal, if it is clear that his rights were not prejudiced thereby."

The Party Entitled to Recover Reparation is the One Who Paid and Bore the Charges on Account of Which Recovery is Sought and Who Has Been Damaged Thereby.

The plaintiffs' cause of action arises under Sections 8 and 16 of the Interstate Commerce Act. Section 8 of said Act (24 Stat. L. 379) provides for the civil liability of common carriers for damages caused by violation of any of the provisions of the Act, to wit:

"Such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation."

Section 16 of said Act among other things provides that:

"If the carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the District in which he resides * * * a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises."

Reparation, as the word is used in the field of Interstate Commerce Law, was defined in *Southern Pine Lumber Co.* case, 14 I. C. C. 195, 197, as follows:

"Proceedings for reparation before the Commission for indemnitory damages are purely statutory and correspond to actions at law sounding in tort. Bouvier defines 'reparation' as 'damages for an injury, amends for a tort.' If an injury is sustained on account of violation of law, the proceeding is in its nature *ex delicto*, and therefore, carries with it none of the features or incidents of an action *ex contractu*."

In *Penna. R. Co. vs. International Coal Company*, 230 U. S. 184, it is said at page 200:

"On the civil side, the act provided for compensation, not punishment."

In *Spiller vs. A. T. & S. F. Ry. Co., et al.*, 253 U. S. 117, this court said at page 135:

"A claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty, but for compensation."

The suit of *Parsons vs. C. & N. W. Ry. Co.*, 167 U. S. 447, was an action brought in the Circuit Court of the United States to recover of the defendant $1,550.00 on account of alleged violations of the Interstate Commerce Act. In the course of the opinion the court says, page 460:

"The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So before any party can recover under the Act, he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury."

"We think, therefore, without attempting to take judicial knowledge of the general order made by the Interstate Commerce Commission in reference to the publication of joint tariffs, the plaintiff has failed in

that full and clear showing of injury which is necessary in order to justify a recovery under the Interstate Commerce Act."

See *Penna. R. Co. vs. International Coal Mining Co.*, 230 U. S. 184.

The Court of Appeals in *Lehigh Valley R. Co. vs. Meeker*, 211 Fed. 785, in referring to Section 8 of the Act said:

"It is not a *general* liability that is imposed by the act, but a particular liability to the person injured 'for the full amount of damages sustained in consequence of any violation of the provisions of the act'."

In *Lehigh Valley R. Co. vs. Meeker*, 236 U. S. 412, this court held that the finding of the Commission as to the amount awarded as reparation represented *prima facie* the claimant's *actual pecuniary loss*, and that in the absence of evidence to the contrary this rebuttable presumption would become conclusive. (Italics ours).

In this same case in speaking of what findings the act requires the Commission to make in a complaint for reparation, the court says *inter alia*, page 428:

(5) "Whether if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; * * *"

(7) "Whether if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages."

In *Anadarko Cotton Oil Co. vs. A. T. & S. F. Ry. Co.*, 20 I. C. C. 43 cited by this court in *Baer v. D. & R. G. Ry.*, 233 U. S. 479 the Commission said:

"* * * It follows that the Commission is not justified in awarding damages in any case except on a basis as certain and definite in law and in fact as is es-

sential to the support of a final judgment or decree requiring the payment of a definite sum of money by one party to another."

In *Knudsen vs. Mich. Cent. R. R.*, 148 Fed. 968, 974, it was said by the Circuit Court of Appeals for the Eighth Circuit that:

> "To support a recovery under this section there must be a showing of some specific pecuniary injury."

In *Mills vs. Lehigh Valley R. R. Co.*, 238 U. S. 473, 481-482, this court said:

> "What the Commission decided was that the shippers were entitled to reparation; that is, to be made whole, to be compensated for a loss because of an illegal unreasonable exaction, and the amount which they stated as the sum to be paid 'as reparation' on the specified shipments was the amount which they found necessary to accomplish the reparation,—to afford the compensation. * * * When the Commission has found that there was damage to a specified extent *prima facie*, the damage is shown."

The Order of the Commission in this Case is Based Upon a Prior Holding of the Commission in the Case of Missouri Portland Cement Co. vs. Director General of Railroads, 88 I. C. C. 492 (Opinion of District Court, R. 68).

For many years prior to the decision in the *Missouri Portland Cement* case, *supra*, the Commission had uniformly held that the party entitled to recover reparation was he who had paid and borne the freight charges for the transportation service, but in the *Portland Cement* case, the Commission reversed its former decisions and held that the fact of who actually bore the charges was immaterial; that the sole question was as to who *physically* paid the charges

to the carrier; that such party was entitled to recover reparation (damages) although he has suffered no loss.

The facts in said case and the conclusion reached by the majority of the Commission is well stated by his Honor Judge Woodward in the District Court in his opinion in the case at bar, 39 Fed. (2d) 81-82; viz.:

> "In the *Missouri Portland Cement Co.* case it appeared that carloads of sand were sold F. O. B. complainant's plant at Memphis, Tenn., and consigned to various consignees at different points. The complainant prepaid the switching charges, but admitted that by separate invoices it subsequently collected from the consignees the amount so paid. The complainant contended that it paid, and, as between it and the defendant, bore the charges on these shipments, and that it is a proper party to bring the proceeding. The Commission say: 'Defendant in reply cites numerous cases in which we have held that the party who actually bore the charges, as such, is the only one entitled to recover. Defendant's statement of our practice in the past is accurate.'
>
> "Under the above state of facts, the Commission held that the complainant, the consignor, although the excess charges were actually paid by the consignees, was the party injured and was entitled to recover reparation. The holding in the *Missouri Portland Cement Co.* case is explained by the Commission in the late case of *California Fruit Exchange vs. American Railway Express Co.*, 155 I. C. C. 105, at page 107, as follows: 'Contentions similar to those advanced by defendants here were advanced in *Missouri Portland Cement Co. vs. Director General*, 88 I. C. C. 492 * * *. Therein we found that in determining who is entitled to reparation it is not necessary to *go beyond the first step; that the first step is taken when the freight charges are paid; and that the fact that whoever paid in the first instance suffered no ultimate damage is not of controlling importance.* In the absence here of the consignors who finally bore the charges, the inquiry need not extend further than to determine who paid the charges in the first instance.'" (Italics ours).

"Such holding, as the commission says in its report, reversed a long and uninterrupted series of decisions holding to the contrary. In the case of *Sloss-Sheffield Steel & Iron Co. v. L. & N. R. R. Co.*, 40 I. C. C. 738, 740, the commission summarizes its holdings in the following language:

> 'The Commission has held without exception that where freight charges are paid by consignees but are charged back to the consignors, the consignees are not entitled to reparation. *Mountain Ice Co. vs. D. L. & W. R. R. Co.*, 21 I. C. C. 45; *Commercial Club of Omaha vs. A. & S. R. Ry. Co.*, 27 I. C. C. 302; *Traffic Bureau, Sioux City Commercial Club vs. A. & S. R. R. R. Co.*, 37 I. C. C. 353; and other cases.
>
> 'In *Hygienic Ice Co. vs. C. & N. W. Ry. Co.*, 37 I. C. C. 384, the Commission held that the party entitled to reparation is the one who finally bore the freight charges.
>
> 'In *Oden & Elliott vs. S. A. L. Ry.*, 37 I. C. C. 345, the Commission held that the party entitled to recover is he who has either by himself or by another paid and borne the freight charges for the transportation service, and that the ultimate test as to who shall recover is the bearing of the freight charges for the transportation service.'

"If this case were decided in accordance with the earlier holdings of the commission, it is clear that plaintiffs cannot maintain this suit. If, on the other hand, it is to be decided in accordance with the holding of the commission in the *Missouri Portland Cement Co.* case, and forty or fifty similar holdings since the decision in that case, then the plaintiffs are the proper parties to maintain this suit."

The reason given by the Commission for its departure from its former rulings for many years, is stated thus in *Mo. Portland Cement Co., supra*, on pages 493-494:

"Defendant in reply cites numerous cases in which we have held that the party who actually bore the charges, as such, is the only one entitled to recover."

"Defendant's statement of our practice in the past is accurate. For example, in *Oden & Elliott vs. S. A. L. Ry.*, 37 I. C. C. 345, 348, we said that 'the party entitled to recover is he who has either by himself or by another paid and borne the freight charges for the transportation service, irrespective of the title to the property shipped.'"

* * * * * * * * *

"The decision of the Supreme Court in *Southern Pac. Co. vs. Darnell-Taenzer Co.*, 245 U. S. 531, however, has led us to re-examine this question and consider whether or not we are, as a matter of law, required to confine awards of reparation to parties who actually bore the charges as such."

* * * * * * * * *

"It is the reasoning which the court employed in reaching its conclusion which is of significance and importance in the present proceeding. Briefly, the case arose out of our decision in *Burgess vs. Transcontinental Freight Bureau*, 13 I. C. C. 668. We there found that the rate charged on hardwood from eastern points of production to the Pacific coast had been unreasonable and awarded reparation. Complainants were the consignors of the lumber and it appeared that they had sold f. o. b. destination. The consignees paid the freight charges on delivery and deducted those charges in making settlement with the shipper for the lumber. Complainants, therefore, *actually bore* the freight charges as such, as we have used that expression, unlike complainants here in the case of the 71 carloads above mentioned. * * * Defendants in the *Burgess* case above cited urged that although complainants had paid and borne the freight charges as such, they had not been injured, *inasmuch as they had passed those charges on to the consumer in the price for their lumber.*" (Italics ours).

On page 495, the Commission further says:

> "Here, also, the consignor is the complainant, but it paid the freight charges in the first instance and subsequently collected them by separate invoices from the consignees. But the Supreme Court has said that the 'general tendency of the law, in regard to damages at least, *is not to go beyond the first step,*' that 'plaintiffs suffered losses to the amount of the verdict *when they paid*', and that 'their claim *accrued at once* in the theory of the law and *it does not inquire into later events.*' Two things are clear. One is that the fact that complainant suffered no ultimate damage is not of controlling importance. In the *Darnell-Taenzer* case plaintiffs transferred the damage to the consumer through the selling price of the lumber. Here complainant transferred it to the consignees through separate invoices, and doubtless it finally reached the consumer. * * * This leads directly to the second point which is clear, and that is that the consignees from whom complainant collected the charges by separate invoices paid the charges and could have maintained an action for recovery, for in the *Darnell-Taenzer* case the charges were paid by the plaintiffs in a similar manner. * * * Conceding that here the consignees bore and 'paid' the freight charges as such, did the complainant also pay within the meaning of the court?"

To this conclusion of the majority of the Commission, there was a vigorous dissent by four of the Commissioners. Commissioner Hall dissenting, said pages 497-498:

> "The majority find, with respect to the 71 shipments described, that complainant was damaged solely because it paid the freight charges found to have been unreasonable, notwithstanding the admitted fact that it passed those charges along, as such, to the consignees who thus *bore* them and who are not parties to this proceeding. That finding professes to follow the principle declared in *Southern Pac. Co. vs. Darnell-Taenzer Co.*, 245 U. S. 541, which, when the facts before the Supreme Court are examined and considered, is complete authority for a finding to the contrary. If the Supreme

Court had applied the expression 'later events' as the majority does here its judgment would have been against, rather than in favor of, the consignors in the *Darnell-Taenzer* case.

Complainant (consignor) here stands in the same position as the purchaser (consignee) in the *Darnell-Taenzer* case, of whom the Supreme Court said that 'the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid the increased price'. Clearly the term 'paid' in the sense used by the court contemplated also the *bearing* of the freight charges, since there it was the purchaser who in the first instance paid the charges to the carrier. Here the 'first step' takes us to the consignees who 'proximately * * * suffered losses * * * when they paid'.

"When an unreasonable rate is exacted the interstate commerce act gives to the 'person or persons injured thereby' the right to file complaint with us. We have in such cases consistently found that the person 'injured' is the one who *bears* the freight charges, as such, and I see no reason for a different conclusion here. When this complainant passed along the charges to the consignees, who also were 'in relation with' the carrier, it completely eliminated any possibility of damage to itself, irrespective of what the measure of the rate might have been. How then does its position become changed when we later determine that the rate which it paid, but which it did not bear, is unreasonable? It has lost nothing, and has not been damaged, but by the majority's findings it is designated as the beneficiary of a sum of money which it may keep as compensation for the mere act of advancing the freight charges to the carrier.

None of the cases cited as authority for the text quoted from 21 Ruling Case Law, 902, in the majority's report dealt with an alleged unreasonable rate on shipments. * * *

I can not concur in an award of reparation to a party who admittedly was not injured or damaged.

I am authorized to say that Commissioners Esch, Lewis and Cox concur in this expression of dissent."

The Darnell-Taenzer Lumber Co. was one of a number of complainants in a proceeding before the Interstate Commerce Commission entitled *Burgess, et al. vs. Transcontinental Freight Bureau*, 13 I. C. C. 668, wherein the Commission had found that the rate charged on hardwood lumber from eastern points of production to the Pacific coast had been unreasonable and awarded reparation to the complainants. Complainants, Darnell-Taenzer Co. and several others who had been awarded such reparation were the *consignors* of the lumber, and it appeared that they had sold *f. o. b. destination.* The consignees paid the freight charges on delivery and *deducted those charges* in making settlement with the shipper for the lumber, the Commission holding that although the consignees had *physically* paid the charges, they having deducted the same in making settlement with the shippers, the *shippers* (consignors) *had actually borne the freight charges as such and were entitled to the award of reparation.*

The defendants refused to pay said award on the ground that although the complainants (consignors) had actually paid and *borne* the freight charges as such they had not been injured inasmuch as they had passed those charges on to the *consumer in the price for their lumber.*

Suit was brought in the Circuit Court, W. D. Tenn. to enforce said award. The demurrer to the declaration was sustained (190 Fed. 659). On appeal, the Circuit Court of Appeals reversed the judgment of said court and remanded the case for a new trial, 221 Fed. 890, saying page 895:

"As the record stood, taking into account the *prima facie* effect of the Commission's findings and orders and the testimony adduced on the trial, the *plaintiffs* (con-

signors) *were entitled to a direction of verdict in their favor* for the amount of the alleged excessive freights, provided the jury should find the rates in effect unreasonable and excessive." (Italics ours).

In reply to the carriers' contention (same as raised in the *Burgess* case) that the consumer alone was damaged by the payment of the excessive freight charges, said court (page 892) quotes the following from the opinion of the Commission in *Nicola, etc. vs. L. & N. Ry. Co.*, 14 Interst. Com. Com'n Rep. 199, 208:

> "The suggestion * * * would, if followed, lead the Commission away from the direct results of the act of the carrier in the establishment and exaction of an unjust rate into the domain of indirect and remote consequences and perhaps into questions of equity between the vendor and vendee of the lumber. The vendor sells the lumber for the best price he can get, and the vendee buys at as low a figure as he can. The price which the one is able to get and the other must pay is of necessity fixed or controlled by many influences including, of course, the transportation charges. * * * We do not understand that the act to regulate commerce contemplates or authorizes the application by the Commission of its provisions in respect to reparation on account of unreasonable rates in such manner. Whatever a court of equity might be able to do and be justified in doing in dealing with the relations between vendor and vendee of the lumber in reference to the rates or other considerations, the Commission is confined in the making of awards for reparation to the injury or damage sustained by those who are the real and substantial parties at interest in the transaction in which such transportation charges have been made. The reparation is due to the person who has been required to pay the excessive charge as the price of transportation. It follows that we must, in making orders of reparation in these cases, upon proper proof of the shipments, make such orders in favor of those who paid the charges as freight charges, or on whose account the

same were paid, and who were the true owners of the property transported during the period of transportation."

Also quotes from what the Commission said in its first report in the *Burgess* case (13 Interst. Com. Com'n at page 680):

> "If complainants were obliged to follow every transaction to its ultimate result. and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them."

Upon a new trial in the District Court as directed by the Court of Appeals, the jury were instructed that if they found the rate charged unreasonable and that prescribed by the Interstate Commerce Commission reasonable, they should find for the plaintiffs (consignors) in *accordance with the Commission's award.* The jury found for the plaintiffs and this judgment was *affirmed* by the Circuit Court of Appeals, 229 Fed. 1022.

Upon appeal to this Honorable Court the aforesaid judgment *was affirmed*, thus upholding the decision of the Commission in the original case to the effect that although the consignee may have *physically paid the freight charges*, yet, if he deducts the same in settlement with the consignor, he, the consignor, is the person who actually bears said charges and is the party injured and is entitled to the award of reparation. The fact that the judgment in the *Darnell-Taenzer* case was *affirmed by the Supreme Court* in 245 U. S. 531 finally disposes of the question as to whom the award of reparation should be made under facts similar to above.

We think the correct interpretation of the opinion of the Supreme Court in the *Darnell-Taenzer* case is well stated by the District Court in the case at bar, page 83, 39 Fed. (2d) viz.:

"As this court interprets the *Darnell-Taenzer* case, it simply holds that the court, in a suit on a reparation award, will not inquire into the commercial effect of the payment of an illegal freight rate. What the court refers to, in the *Darnell-Taenzer* case, is the economic incidence of the payment of the excessive charge. Who, in an economic sense, ultimately bears the payment, is a matter into which the court will not inquire. The economic bearer of the burden, be he purchaser or consumer, is not a proper party plaintiff. Neither can the defendant absolve itself from the payment of damages because, in an economic sense, the plaintiff might add the excess price to his product and itself impose the burden or injury upon the consumer." (R. 71).

Why the Commission should have reversed a long line of its decisions holding that the party entitled to reparation was he who *bore* the freight charges, is incomprehensible, because in the *Darnell* (*Burgess*) case, the Commission itself had awarded reparation to the shipper, *although the freight charges had been physically paid by the consignee,* and upon appeal to this Honorable Court, it *affirmed* said holding, hence, the Commission's opinion in the *Portland Cement* case is not only in conflict with its own opinion in the *Darnell-Taenzer* case, but it is directly contrary to the decision of this court in that case.

Should there be any doubt remaining as to the proper construction of the opinion of this court in the *Darnell-Taenzer* case, we think it is foreclosed by the opinion of this court in the case of *Louisville & Nashville Railroad Co. vs. Sloss-Sheffield Steel and Iron Co.*, 269 U. S. 217-236.

In that case, the Commission in 60 I. C. C. 595, awarded reparation to the Sloss-Sheffield Company, the shipper, *although the freight charges had been physically paid by the consignee.* The reason stated by the Commission being, because the shipper had actually paid and *borne* the charges. Upon appeal, this court *affirmed* this holding.

In that case the plaintiff was the consignor of the shipments on which it was awarded reparation. The shipments were sold at a delivered price *f. o. b. destination.* The purchaser—consignee—paid the freight bill upon delivery of the shipments and remitted to the plaintiff the amount of the purchase price, less the freight charges. In that case, the Court of Appeals for the Fifth Circuit, said (295 Fed. 57-58):

> "The freight charge cannot well be regarded as paid or borne by a consignee when the payment is made with money to which the consignor is entitled; and in pursuance of a contract obligation of the consignee to the consignor. As the freight was paid by the consignor's debtor, who thereby, pursuant to contract, reduced his debt by the amount of the freight, such payment is to be considered as originally made by the consignor."

This court said:

> "All the shipments were made under a standard form of contract which was aplicable to sales for future delivery in installments and which contained a provision substantially as follows:
>
> > 'Price. Fourteen dollars and eighty-five cents ($14.85) per ton of 2,240 pounds delivered at Chicago, Illinois.
> >
> > This price is based on present tariff freight rate of $4.35 per ton. In case the tariff rate declines, the buyer is to have the benefit of such decline. In case the tariff freight rate advances, the buyer is to pay the advance. * * *'"
>
> "The provision in question is a common one in contracts of sale. Its effect upon the consignor's right to recover overcharges was carefully considered by the Commission in 1911 in *Baker Mfg. Co. vs. Chicago & North Western Ry. Co.*, 21 Interst. Com. Com'n R. 605. It was then held that the consignor must sue if goods were sold f. o. b. destination. This case has been con-

sistently followed by the Commission since, and it was cited in *Southern Pacific Co. vs. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 584, 38 S. Ct. 186, 62 L. Ed. 451. In the case at bar, both the consignor and the consignees claimed reparation; and the Commission's decision denying relief to the consignees seems to have been acquiesced in before that tribunal by all parties. * * *"

"On goods sold f. o. b. destination, the published freight charge from the point of origin becomes, in essence, a part of the seller's cost of production. An excessive freight charge for delivery of the finished article affects him as directly as does a like charge upon his raw materials. Moreover, the burden of the published freight rate rested upon the consignor under the bill of lading, *Louisville & Nashville R. R. Co. vs. Central Iron & Coal Co.*, 265 U. S. 59, 67, 44 S. Ct. 441, 68 L. Ed. 900, as well as under the contract of sale. The purchaser who paid the freight did so solely as agent for the seller."

In this connection, attention is called to the footnote on page 236 of said opinion referring to a large number of decisions by the Commission, in all of which it had held that the person *actually bearing* the freight charges, was the party entitled to the award of reparation. In said note no reference whatever is made to the Commission's opinion in the *Portland Cement* case.

In *Illinois Central R. Co. vs. Vest, et al.*, on plaintiffs' motion for a temporary injunction against enforcement of an order of the Railroad Commission of Ky., 39 Fed. (2d) 658, the court on page 660 says:

"The rule is that, where a shipper pays a rate held to be unreasonable, he may recover the excess and need only show that he paid and *bore* the charges, and neither the Commission nor the court will inquire whether, in the course of his business, he recouped his losses or passed them on to others. This was held in *Southern Pacific Co. vs. Darnell Lumber Co.*, 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451, and reaffirmed in *L. & N. R. Co.*

vs. Sloss-Sheffield Co., 269 U. S. 217, 46 S. Ct. 73, 70 L. Ed. 242. The questions of counsel for the railroad company to which objections were sustained dealt with the subject of passing the charges on to others, which, under these authorities, was not open."

We respectfully submit that the Commission misapprehended the significance of the decisions in the *Darnell-Taenzer* and the *Sloss-Sheffield* cases, and as the decision in the *Missouri Portland Cement* case is in conflict with said decisions the ruling of the District Court should be affirmed.

That the majority of the Commission still adheres to its decision in the *Missouri Portland Cement* case, *supra*, is shown in its comparatively recent decision in *General Grinding Wheel Corp. vs. Southern Ry. Co., et al.*, decided subsequent to the District Court's decision in the case at bar, 169 I. C. C. 83-91 (decided November 4, 1930). In that case complaint had been made to the Commission in regard to certain rates on abrasive grains and the Commission had found the rates charged to have been unreasonable and for the future established rates deemed reasonable and awarded complainant a certain sum as reparation on the past shipments. The Commission on page 83 says:

> "Briefly, the record shows that complainant, as consignee, paid the freight charges on these shipments in the first instance; that the consignor, under the terms of an agreement of sale, equalized the rate on abrasive grains from Niagara Falls, N. Y. to Philadelphia, which, during the period of movement, was 32 cents; and that complainant charged back 67 cents per 100 pounds to the consignor and bore the remainder, or 32 cents. On hearing, defendants did not oppose an award of reparation to the proper party, but contended that under the circumstances stated, complainant is not lawfully entitled thereto.
>
> "In their petition defendants renew that contention and ask that the reparation order be vacated and set

aside, in view of the recent decision of the United States District Court for the Northern District of Illinois in case of *Adams vs. Director General*, 39 F. (2d) 80. In that case the freight charges on shipments of live stock to Chicago were paid by the consignees, commissionmen at that point. The court said that while the manual operation of paying the freight was through the instrumentality of the commissionman, he was using the money of the shipper and not his own money; that the commissionman was an agent, and in making the payments, he made them out of the funds of the farmers and shippers; that the plaintiffs, commissionmen, had no legal interest in the proceedings; that they had adopted themselves as convenient agents to secure recovery, and that they were not the ones who had been damaged by the imposition and collection of the excessive charge. The court held that the persons whose rights had been violated and whose money the defendants illegally retained were the farmers, producers, and shippers and not the commissionmen, and that the plaintiffs could not maintain the action."

The Commission further says:

"The facts in the present case are similar to those considered in *Consolidated Cut Stone Co. vs. A. T. & S. F. Ry. Co.*, 39 F. (2d) 661, in which our award of reparation was upheld by the United States District Court for the Northern District of Oklahoma."

Four of the Commissioners dissented from this opinion, and Commissioner Mahaffie, page 86, said:

"I concur in the conclusion here because of the desirability of consistency in our reports and because of the apparent conflict in the decisions of the district courts cited in the majority report."

Commissioner Lewis, dissenting, said:

"Since the decision in *Missouri Portland Cement Co. vs. Director General*, 88 I. C. C. 492, in which I dissented, I have in several cases, although with a mental reserva-

tion, voted for reports which followed the doctrine therein laid down as the conclusion of the majority of the commission and therefore the decision of the commission. Inasmuch, however, as the question is here raised anew, I again record my dissent."

He further stated:

"I am aware that the decision of the district court in *Adams vs. Mellon* is not binding upon us, as would be the case if it were a decision of the Supreme Court of the United States, but in my judgment it embodies so correct an exposition of the law upon the point in question that we should now adopt and follow it."

"I also concur in Commissioner Lee's dissenting expression."

Porter, Commissioner, dissenting, page 87, said:

"I concur generally in all that is said in the dissenting expression of Commissioner Lee. When this case was before the division, I felt constrained to follow the doctrine of the *Missouri Portland Cement* case, as the accepted rule of this commission. In some cases I have heretofore voiced my disapproval of that doctrine."

Lee, Commissioner, dissenting, page 88-91, after quoting Section 8 of the Interstate Commerce Act, says:

"Complainant's right to reparation for the collection of an unreasonable rate, therefore, hinges on whether it has been 'damaged' within the meaning of the act.

"The Supreme Court has declared that the liability of a carrier in charging an unreasonable rate 'arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier.' *Louisville & Nashville R. R. Co. vs. Sloss-Sheffield Co.*, 269 U. S. 217, 232.

"Our decision in the *Missouri Portland Cement* case was based wholly on the then recent decision of the Su-

preme Court in *Southern Pacific Co. vs. Darnell-Taenzer Co.*, 245 U. S. 531, and, in reaching the conclusion above set forth (in the *Missouri Portland Cement* case) we reversed a long line of decisions wherein we had required proof of the bearing of the freight charges by a complainant as an essential prerequisite to the recovery of an award of reparation."

On page 90, the Commissioner continues:

"The opinion of the court in *Louisville & Nashville R. Co. vs. Sloss-Sheffield Co., supra,* rendered subsequent to our decision in the *Missouri Portland Cement* case, only serves to emphasize our misconception of the 'reasoning employed by the court' in the *Darnell-Taenzer* case."

Page 91:

"In view of these circumstances, for the majority to continue to accept as correct the holding in the *Missouri Portland Cement* case and to award reparation to the complainant in the instant case, who admittedly did not bear the unreasonable portion of the charges, who has not sustained the slightest damage, and who is not 'entitled to' the award, is a novel, if not unusual, conception of the law.

"I am authorized to state that Commissioner Tate concurs in this dissent."

The majority refers to the decision of the District Court, N. D. Oklahoma, in *Consolidated Cut Stone Company vs. A. T. & S. F. Ry. Co.*, 39 Fed. (2d) 661 as being in conflict with the decision of the District Court in the case at bar. We are unable to see any conflict. The district Court in the case at bar held that the plaintiffs could not recover because they had not *borne* the charges, whereas in the *Consolidated Cut Stone* case both the Commission and the court found that the plaintiffs had *borne* the charges in question,

and, therefore, were lawfully entitled to recover reparation. The opinion of the Commission is reported in 113 I. C. C. 480, and on page 485 it says:

> "We find * * * that complainants made the shipments as described and paid and *bore* the charges thereon at the rates herein found unreasonable; that they have been damaged in the amount of the difference between the charges paid and those that would have accrued at the rates herein found reasonable; and that they are entitled to reparation with interest."

The award, therefore, in this case was in conformity with the decisions of the Commission prior to its decision in the *Missouri Portland Cement* case. The District Court *approved the findings of the Commission that plaintiffs had borne* the charges found to have been unreasonable. The question, therefore, of whether those plaintiffs could have recovered had the findings been that they had *not borne* the freight charges was not determined. The issue presented to the District Court in the case at bar was not present in the *Consolidated Cut Stone* case.

Brief Filed on Behalf of the Interstate Commerce Commission as Amicus Curiae.

Throughout a good portion of that brief it is assumed that the plaintiffs were awarded reparation "as factors", but as we have shown, this is not a fact. The plaintiffs were awarded reparation in their own right, and, therefore, a discussion of their right to maintain this suit in the representative capacity as factors is not in issue.

However, even if complaint had been made to the Commission as factors, they would not under the decision of the Commission in *Crutchfield & Woolfolk vs. Sou. Pac. Co.*, 24 I. C. C. 679 have been entitled to recover. In this case the Commission said:

"We have held that where a commission merchant who pays the freight in the first instance has settled with his principal who, by the terms of that settlement has paid the freight charges, such commission merchant has no further interest in the transaction, and is not a proper party to maintain a proceeding for the recovery of reparation. But it must appear that the account has been closed, that the freight has been in fact paid by the principal and that the interest of the commission merchant has been extinguished." *G. F. Hinrichs vs. Wells Fargo Co.*, 53 I. C. C. 362, 364.

In referring to the right of the plaintiffs to recover reparation under the provisions of the Interstate Commerce Act as factors (although not in issue in the case) the District Court quoted an opinion of the late Judge Sanborn of the Eighth Circuit rendered in a receivership proceeding in the District Court for the Eastern Division of the Eastern District of Missouri in the case of *North American Co. vs. St. Louis and San Francisco R. R. Co.* (Appendix 133). In his opinion, Judge Sanborn says:

"The interveners, however, pray that the payment be made to the factors. The defendant objects that the factors were not the parties damaged, the Commission so held, and there is substantial—nay, conclusive evidence that the factors did not, and that the country growers and shippers did suffer and bear the substantial damages. Notwithstanding this fact and notwithstanding the fact that the Commission itself reported and found that the factors in their representative capacity were entitled to the reparation. Its subsequent order was that the receivers be authorized and directed to pay the reparation to the factors without making any reference in that order to their representative capacity."

Judge Sanborn further says:

"The factors insist that this court should order the amount of the reparation paid to them. But since they did not, and the growers and shippers did suffer and

bear the damages the court is not persuaded that they have either the property rights in the claims for damages or the authority to release or assign them. While, so long as a factor is engaged in discharging his active duty of paying the freight charge including the overcharge and remitting the proceeds, he may have authority to settle, compromise or release the claim of his principal for the refund of the overcharge, because during that time he has a pecuniary interest in the claim for the refund, yet, when such a transaction is completed, without more, the property right of the shipper in the claim for the refund becomes exclusive and the factor's right or power to release, discharge, or assign it no longer exists."

In referring to the reasons given by the Commission authorizing the granting of reparation to the complainants as factors—which award as we have shown was not made—the Commission based its authority so to do on the statement that "defendants have frequently recognized this relationship by settling loss and damage claims with the commission merchants". The District Court said:

"This contention cannot be maintained. The right to maintain a suit is that given by the statute to 'the person or persons injured'. The right, therefore, to maintain a suit is given by law. Any act, practice or custom either of the Chicago Live Stock Exchange, the commissionman, or of the carriers could not confer the right to maintain the suit."

In its brief, pages 4-5, the Commission says that it held "that the services of loading and unloading are *part of the transportation* of live stock; and that the collection of *separate charges* from the shippers for loading and unloading *in addition to the line-haul rates* was an unlawful and unreasonable practice." (Italics ours.)

As we have heretofore shown, the through transportation rate was made up of the trunk line rates to the connection

of their rails with the rails of the Junction Railway, plus the trackage charge of $2.00 per car, and the published rate of the Stock Yard Company. The through transportation rate was, therefore, a combination of these separate rates. The Stock Yard Co. completed the transportation by driving the live stock from the cars, across the platforms and through the yards into their appropriate pens, there to await delivery.

That the Commission recognized that the charge of the Stock Yard Co. constituted a part of the through rate is seen from the following quotation from its brief, pages 6-7, "Nor did the Commission find that the apprehensions of the line-haul carriers that the Stock Yard Co. might make any charge it pleased which the line-haul carriers would be required to pay, were well founded for the reasons that"

> "Upon their complaint or upon the complaint of any party, we can examine any of the charges that make up the *sum of the through charges*, and may prescribe just and reasonable rates for all carriers concerned, either by prescribing through routes and joint rates and the divisions thereof, or otherwise as the facts may warrant." (Italics ours.)

The Commission thus recognized that the charge of the Stock Yard Co. constituted a part of the *through* rate, and, therefore, could not be an additional charge to the transportation charge, and hence its basis for holding said charge to be an unlawful practice is incorrect and the order awarding reparation is not justified.

The invalidity of the order of the Commission for the foregoing reasons was set forth with other grounds in the motion of the Director General in the District Court for a directed verdict, viz.:

(1) "The evidence is insufficient to support or sustain the order of the Interstate Commerce Commission sued on in this case." (R. 47).

(3) "The evidence in this case shows that the Union Stock Yard & Transit Co. was, during all of the time complained of in this suit, a common carrier, and that it received the live stock, for the unloading of which the charges in controversy were assessed, and collected from the railroads being operated by the Director General of Railroads, under Federal control, as a connecting carrier; that it unloaded such live stock as such connecting carrier and delivered same after unloading to the consignees entitled to receive the same; that the charge collected for such unloading was provided for in its tariff on file with the Interstate Commerce Commission, and the said Union Stock Yard and Transit Co. collected said charges and received the benefits thereof." (R. 48).

Another ground urged by the Commission to sustain the award to petitioners in their own right is, as we understand it, because a consignee may upon acceptance of a delivery of freight be held liable for freight charges he should, therefore, have the reciprocal right to recover reparation under the Interstate Commerce Act. It is a sufficient answer to this argument to say that the right to recover reparation is a statutory right under the said Commerce Act, and the conditions granting such right must be fully complied with, i. e. the party must show that he and not some one else has suffered a pecuniary loss arising out of the violation complained of.

There is no contractual relationship between the carrier and consignee by the mere designation of the latter as consignee. The consignee's liability for freight charges does not depend on any duty devolving upon him as consignee, but because of an implied agreement to pay the lawful tariff charges created by his acceptance of the goods. If the goods are refused there is no privity with the carrier that will entitle it to sue the consignee for the freight charges.

There is no undisclosed principal in a transportation contract for the only parties to the contract are those named in the bill of lading.

As was said by this court in the *Darnell-Taenzer* decision, *supra:*

> "If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer, who in turn paid an increased price. He has no privity with the carrier."

The purchaser referred to in this excerpt was, under the facts of the *Darnell-Taenzer* case, the consignee, who as in the instant case had paid the freight charges and in turn had deducted a similar amount from the invoice price.

The chief ground on which the Commission overruled its many former opinions to the effect that the party entitled to recover was he who actually suffered the loss—bore the freight charges—appears to be based on its construction of the following language of this court in the *Darnell-Taenzer* case, viz.:

> "The general tendency of the law, in regard to damages at least, *is not to go beyond the first step;* that 'plaintiffs suffered losses to the amount of the verdict *when they paid*', and that 'their claim *accrued at once* in the theory of the law and it *does not inquire into later events.*'." *Missouri Portland Cement* case, 88 I. C. C. 495 (Italics by Commission).

The misconstruction by the Commission of the meaning of the language "the plaintiffs suffered losses when they paid the charges" could not have had reference to the mere physical act of passing the money to the carriers because the plaintiffs, consignors, under the facts in that case did not do so,

the physical payment having been made by the consignees—the first step having thus been taken by the consignees and not by the consignors to whom the award was made.

XI.

NO QUESTION OF PUBLIC IMPORTANCE OR OTHER QUESTION JUSTIFYING THE GRANTING OF A WRIT OF CERTIORARI IS PRESENTED, AND IT MUST NOW APPEAR THAT THE WRIT IN THIS CASE WAS IMPROVIDENTLY GRANTED AND SHOULD BE DISMISSED.

The only ground of affirmance of the judgment of the District Court was that the Yard Company was a common carrier engaged in interstate commerce; that it was required to file tariffs of its charges and to enforce the same, and having done so, the collection of its charges was not unlawful and could not furnish any basis for a recovery on the part of petitioners. Petitioners do not contend the law applicable to such a situation is not as held by the Circuit Court of Appeals. They do contend, however, that the tariffs of the line-haul carriers and the rates contained therein covered the entire transportation, including the unloading at the Yards; that the Yard Company, in performing its common carrier service of unloading, was the agent of the line-haul carriers, and that its tariffs were filed pursuant to such agency and that the Court, in reaching and announcing its conclusion, usurped the function of the Commission. We have shown herein that neither contention of petitioners is tenable.

The questions presented by petitioners and on which the writ of certiorari was granted are thus seen to not be involved in this suit, and not being involved herein, are not subject to be reviewed or decided by this Court. The ques-

tion as to whether the petitioners had such interest as would permit them to maintain the suit if otherwise maintainable, was not determined by the Circuit Court of Appeals, the deciding of such question not being necessary to an affirmance of the judgment. We do not understand this Court will review a question decided by the District Court in a case where the questions decided by the Circuit Court of Appeals do not of themselves furnish the basis for granting writ of certiorari.

If we are right in such understanding, then the writ in this case was improvidently granted, and when such fact is made to appear in any stage of the proceedings, the writ will be dismissed.

Such a case was *Layne & Co. vs. Western Well Works, Inc., et al.*, 261 U. S. 387-393. In that case after submission on the merits, it was discovered that the writ was improvidently granted, and the writ was accordingly dismissed. On page 393 the Court said:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head.
>
> "Precedents for dismissing a writ of certiorari improvidently granted are found in *Furness, Withy & Co. vs. Yang-Tsze Insurance Association*, 242 U. S. 430, and in *United States vs. Rimer*, 220 U. S. 547.
>
> Writ of certiorari dismissed."

The same thought is expressed in *Magnum Import Co. vs. Coty*, 262 U. S. 159-163, where it is said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeal was given for two purposes; first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

Certainly the purpose of a writ of certiorari is not the determination of questions which are not presented when the real facts of the case are considered. It would be idle for this Court to determine what the rights of the parties might be if the Yard Company was, in fact, the agent of the line-haul carriers when the evidence shows such agency did not exist. It would be idle to determine the question of what the rights would be in the event the line-haul carriers' tariffs and charges covered the unloading of the live stock, where it appears in the evidence conclusively that the tariffs did not cover the unloading, either in the transportation or in the charges for the transportation furnished. It would be idle to determine whether the Court can usurp the functions of the Commission when the record conclusively shows there was no such usurpation.

That a Court may not set aside the act of the Commission where administrative discretion is involved, is conceded. The Courts have repeatedly so held and there is now no conflict on such question.

In conclusion, we respectfully urge that the writ of certiorari was, for the reasons hereinbefore set forth, improvidently granted, and should be dismissed. If, however, the Court is of opinion it may properly review the decision of the

Circuit Court of Appeals, then we urge that, for the reasons presented, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

Act to Regulate Commerce, Section 1, Paragraph 6.

(6) *Classification of property for transportation; regulations and practices.* It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Act to Regulate Commerce, Section 6, Paragraph 1.

(1) *Schedule of rates, fares, and charges; filing and posting.* Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all

privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

Act to Regulate Commerce, Section 6, Paragraph 4.

(4) *Joint tariffs.* The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Act to Regulate Commerce, Section 6, Paragraph 7.

(7) *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passsengers or property, except such as are specified in such tariffs.

Act to Regulate Commerce, Section 8.

Liability in damages to persons injured by violation of law. In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Act to Regulate Commerce, Section 15, Paragraph 5.

(5) *Transportation of livestock in carload lots; services included.* Transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stock yards shall include all necessary service of unloading and reloading en route, delivery at public stock yards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers existing on February 28, 1920, by virtue of law respecting the transportation of other than ordinary live stock, or the duty of performing service as to shipments other than those to or from public stockyards.

Transportation Act 1920, Section 206 (c), Section 74, Paragraph (c).

(c) *Complaints for reparation; jurisdiction to hear.* Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreason-

ably prejudicial, or otherwise in violation of chapter 1 of this title, may be filed with the commission within one year, or, if so claimed in respect of overcharges above the legal tariff charge, within two years and six months, after February 29, 1920, against the agent designated by the President, under subdivision (a) of this section, naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under the Federal control at the time the matter complained of took place. The commission is given jurisdiction to hear and decide such complaints in the manner provided in chapter I of this title, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a) of this section.

IN THE DISTRICT COURT OF THE UNITED STATES WITHIN AND FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

NORTH AMERICAN COMPANY, Complainant,	)	
vs.	)	In Equity.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, ET AL., Defendants.	)	No. 4174.

IN THE MATTER OF THE INTERVENTION OF SBSTON, WYNNE & COMPANY, ET AL., FACTORS.

MEMORANDUM.

SANBORN, Circuit Judge:

The final decree in the main suit above entitled, which was rendered in August 1916, required the purchaser at the foreclosure sale to assume and pay as a part of the consideration for its purchase of the property of the mortgagor railroad company, the debts and liabilities of the receivers. At the time of the purchase by the St. Louis-San Francisco Railway Company at the foreclosure sale under the decree of the property of the mortgagor railroad company the receivers were liable to about 3500 country growers and shippers for damages sustained by them from the collection by the receivers of about $25,000 of overcharges for freight on cotton shipped by them to Memphis, Tennessee, the payment of which

was assumed by the defendant. About thirty of the factors doing business in Memphis who received, paid the freight upon, sold, and after deducting the freight charges they paid including the overcharges and their commissions, remitted the balance to their principals, have intervened in this foreclosure suit and now ask a decree of this court that the defendant pay to them this $25,000 and interest.

The overcharges were collected by the receivers and the cotton was shipped to and sold by the factors between May 27, 1913 and December 27, 1914. When these overcharges were collected they were parts of rates lawfully in force and the overcharges were subsequently held to be unreasonable by the Interstate Commerce Commission. When the receivers learned that these overcharges were deemed unreasonable they applied informally to the Commission for permission and authority to them to pay back to the shippers the amounts collected on account of these overcharges, but the Commission refused them permission so to do. This proceeding on the informal application was pending before the Commission from May 1915 until March 11, 1916, when it finally decided that the allowance of the refunds to the shippers should not be allowed in this informal way, and gave notice that if a formal complaint was to be filed it must be presented to the Commission within six months from March 11, 1916. Within the six months, on September 2, 1916, a formal complaint was filed praying a finding and order that the tariff under which the overcharges were collected was unreasonably high and that the complainants were entitled to collect the refunds. This formal complaint contained in its title the name "Memphis Freight Bureau, on behalf of the following persons, firms and corporations, all doing business in Memphis, Tennessee" and the names of about forty factors as complainants. The first averment in this complaint was:

"That the Memphis Freight Bureau is a corporation chartered under the laws of the State of Tennessee for the purpose of protecting the merchants, manufacturers and shippers of Memphis and vicinity in the matter of freight rates. It brings this petition for the use and on behalf of the persons, firms and corporations named in the caption, who are all engaged in the cotton business at Memphis, Tenn., and who are the factors, agents and representatives of a great number of growers of and dealers in cotton who are too numerous and too widely scattered to be named as petitioners herein.

For many years these dealers and growers of cotton scattered all over the cotton growing territory adjacent to Memphis, have been shipping cotton to the persons named in the caption, for the purpose of having same sold and proceeds credited to said growers and shippers".

This allegation was followed by others alleging the unreasonableness of the rate, and setting forth the claims of the complainants to collect the overcharges for their principals—the 3500 growers and shippers, but it did not contain the names of the latter. The defendant railway company answered, testimony was taken, and the commission on May 18, 1918 held that the overcharges were unreasonable, that the country growers and shippers had suffered the damages and borne the loss occasioned by the collection thereof, and that the factors had not, and that the growers and shippers were not before it, and it refused to order the payment of the damages to the factors. 50 I. C. C. 345.

On August 10, 1918 the complainants filed a petition for rehearing and for leave to amend their complaint by making the country growers and shippers parties as complainants, and in January 1919 the Commission ordered the case reopened and that the complainants' petition "For Leave to amend complaint * * * by making parties complainant the original consignors, the country growers and shippers, who, the Commission found, paid the charges and suffered the damages, be and the same is hereby granted". No amendment to the petition pursuant to that order and no evidence of any notice to the original consignors of this order has been called to the attention of the court, but in its subsequent report of January 5, 1920, 57 I. C. C. 212, the Commission declared that "some 3500 country growers and shippers were made complainants". In that report the Commission wrote: "They (the factors) point out that, without specific instructions from the many hundreds of individual growers who shipped the cotton to them for sale, it is their duty and custom, as factors, to pay the freight charges, and to file claims and suits for loss and damages and excess freight charges in connection with shipments of cotton. They testify that this custom is not only recognized by the growers and factors themselves, but by the railroads who settle with the factors for claims and suits". The Commission further held that the claims of the growers and shippers were saved from the bar of limitation by the filing of their claims "Within the statutory period in the names of the factors" and wrote: "We have

found that the tariff provisions and regulations were unjust and unreasonable to the extent previously stated herein. We further find that the country growers and shippers made the shipments involved, and paid and bore the charges thereon through the complainant factors; that they have been damaged to the extent of the difference between the charges paid and those herein found reasonable, and that the complainant factors, in their representative capacity, are entitled to the reparation with interest, on shipments made subsequent to May 27, 1913, provided such shipments were covered by claims presented to us within the statutory period."

The intervening petition of the factors in this court was answered by the defendant. Much evidence was introduced and briefs and arguments have been presented and considered by the court.

This is a proceeding in equity. It is an appeal to the conscience of the chancellor to require the defendant to pay to those entitled to receive it this $25,000 and interest which the receivers owed to the latter when the intervenor purchased the property. No one denies that in justice and equity the consignors, the country growers and shippers, ought to receive this reparation and there can be no doubt that unless there is some insuperable rule of law of equity that forbids it, a court of equity ought to direct its payment by the defendant which assumed the original liability of the receivers to make such payment.

Thoughtful consideration of the defendant's objections to such payment has convinced that it ought not to be withheld on account of any of them except that the factors did not suffer the damages, and that the claims of the consignors and factors are barred.

The intervenors, however, pray that the payment be made to the factors. The defendant objects that the factors were not the parties damaged, the Commission so held, and there is substantial—nay, conclusive evidence that the factors did not, and that the country growers and shippers did suffer and bear the substantial damages. Notwithstanding this fact and notwithstanding the fact that the Commission itself reported and found that the factors in their representative capacity were entitled to the reparation. Its subsequent order was that the receivers be authorized and directed to pay the reparation to the factors without making any reference in that order to their representative capacity.

There was substantial evidence before the Commission

and there is substantial evidence in this suit that it was and is the established practice and custom of factors at Memphis receiving and selling cotton shipped to them from their customers in the surrounding country to present and prosecute the claims of the latter for overcharges thereon and damages thereto by the railroad companies, and no evidence to the contrary is called to the attention of the court. In this state of the case the court is of the opinion that the complaint of the Memphis Freight Bureau and the factors was a sufficient presentation to the Commission of the claims of the country growers and shippers to prevent the bar of any limitation prescribed by any act of Congress or rule of the Commission, and the Memphis Freight Bureau and the factors were sufficiently empowered by the country growers and shippers to make this presentation. *Spiller vs. A. T. & S. F. Ry.*, 253 U. S. 117, 122, 124, 125. The object of rules and statutes of limitations is to compel notice to the defendant of claims to be prosecuted against him so that he may not lose the evidence he may have in defense of them and a full opportunity to prepare that defense. The evidence is conclusive that the receivers and the defendant had not only notice but absolute knowledge of these claims of the growers and shippers and of their equitable nature from early in the year 1915. The same men acted as officers of the Traffic Department of the defendant after the foreclosure sale that acted for the receivers before it.

The factors insist that this court should order the amount of the reparation paid to them. But since they did not, and the growers and shippers did suffer and bear the damages the court is not persuaded that they have either the property rights in the claims for damages or the authority to release or assign them. While, so long as a factor is engaged in discharging his active duty of paying the freight charge including the overcharge and remitting the proceeds, he may have authority to settle, compromise or release the claim of his principal for the refund of the overcharge, because during that time he has a pecuniary interest in the claim for the refund, yet, when such a transaction is completed, without more, the property right of the shipper in the claim for the refund becomes exclusive and the factor's right or power to release, discharge, or assign it no longer exists. *Sloss Sheffield-Iron Company et al. vs. Louisville & Nashville R. R. Co.*, 40 I. C. C. 738, 740; *Hygienic Ice Co. vs. Chicago & North Western Ry. Co.*, 37 I. C. C. 384; *Oden & Elliott vs. Seaboard*

Air Line Ry. Co., 37 I. C. C. 345. Many years have passed since the shipments and sales were made whence the rights of these parties arose, and upon payment of this reparation or any part of it the defendant is entitled to a release and satisfaction of the claim to it by him who has the right of property in that claim. In the opinion of the court the release and satisfaction by the factors of their claim to this reparation or to any part of it would not justify the court in requiring the defendant to pay it to them, unless such release and satisfaction was accompanied by releases and satisfactions or their equivalents of that claim by the country growers and shippers who suffered and bore the damages from which the claim sprang. Upon the presentation to the court of such releases and satisfactions executed by the original consignor or their equivalents a subsequent application for an order of payment by the defendant may be made.

Endorsed
Filed June 17, 1922.
Jas. J. O'Connor, Clerk.

CERTIFIED COPY. D. C. Form No. 30.

UNITED STATES OF AMERICA)
) SS.
Eastern District of Missouri)

I, Jas. J. O'Connor, Clerk of the United States District Court in and for the Eastern District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Memorandum, filed June 17th, 1922. now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at St. Louis, Mo., this 29th day of November, A. D. 1929.

JAS J. O'CONNOR, *Clerk.*
By RUTH COLLINS, *Deputy Clerk.*

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CHARLES EL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,
Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,
Respondents.

BRIEF ON BEHALF OF UNION STOCK YARD & TRANSIT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SILAS H. STRAWN,
RALPH M. SHAW,
FRANK H. TOWNER,
Counsel for said Respondent.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

PAGE

Statement of Fact 3

Summary of Argument 12

Argument:

The reasons relied upon by petitioners as justifying the granting of the writ are insufficient. 13

The opinion and decision of the Circuit Court of Appeals affords no ground for a petition for certiorari 18

The petition herein urges no reason or ground justifying the granting of a writ of certiorari . 23

Cases Cited.

Armour & Co. v. United States, 209 U. S. 56..... 20

B. & O. Ry. Co. v. United States, 277 U. S. 291..... 20

Davis v. Portland Seed Co., 264 U. S. 403..... 20

F. E. C. Ry. Co. v. United States, 234 U. S. 167.... 20

Furness, etc. Co. v. Yana-Tsze etc. Ass'n., 242 U. S. 430 2

I. C. C. v. Stickney, 215 U. S. 98..... 21

Keller v. Adams-Campbell Co., 264 U. S. 314..... 25

Layne, etc. v. Western Wells Works, 261 U. S. 387.. 24

Magnum Co. v. Coty, 262 U. S. 159..... 25

Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184..... 20

Southern Power Co. v. Northern Carolina, etc. Co., 263 U. S. 508..... 25

United States v. U. S. Y. & T. Co., 192 Fed. 330; 226 U. S. 286.....3, 20

United States v. Rimer, 220 U. S. 547..... 24

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Respondents.

BRIEF ON BEHALF OF UNION STOCK YARD & TRANSIT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

In compliance with the rules of this court, petitioners have included in their petition for certiorari filed herein (pp. 3 *et seq.*) what is designated as a summary statement of the matter involved. This statement, however, is not sufficiently complete to inform this court of the essential facts developed

on the record and relied upon by the Circuit Court of Appeals in reaching its decision. A correct and full statement of the essential facts is required in every such petition (*Furness, Withy & Company* v. *Yang-Tsze Insurance Association, et al.*, 242 U. S. 430) and is particularly important in this case.

A correct statement of the essential facts is contained in the brief filed herein by the Director General of Railroads in opposition to the granting of the writ prayed for. We wish, however, to draw the court's attention in some detail to certain facts which particularly affect the status of the Yards Company in the litigation and which, in our opinion, require a denial of the petition.

STATEMENT OF FACTS.

As appears from the statement of facts contained in the petition and brief filed herein on behalf of respondent, the Director General, the Union Stock Yard & Transit Company (hereinafter called the "Yards Company"), started its operations in 1865 (R. 123). From then up to the present time, it has performed the service of loading and unloading live stock consigned from and to the stockyards in Chicago, doing the work with its own employees at platforms and other facilities owned by it. It has never at any time performed any service in the actual transportation of live stock. In 1867 it first installed a charge of 50 cents per car for loading and a charge of 25 cents per car for unloading live stock shipped to the stockyards and up to January 1, 1919, these charges were paid to the Yards Company by the railroads handling the live stock into and out of the yards (R. 124).

Up to the time of the decision in *United States* v. *U. S. Y. & T. Co.*, 226 U. S. 286, the loading and unloading charges of the Yards Company had not been contained in any tariff filed with the Interstate Commerce Commission, but after that decision, it published and filed with the Commission its Tariff No. 1, I. C. C. No. 1 (Part of Ex. 1, attached to Defts.' Ex. 1, certified to this court), stating its charges of 25 cents and 50 cents per car for unloading and loading such live stock. This tariff was published by the Yards Company alone, and on its own behalf. As a matter of fact, neither the railroads nor the Director General has ever been a party to any tariff issued by the Yards Company, and the Yards Company has never been a party to any tariffs issued by the railroads or the Director General (See Stipulation, Pars. 5,

6 and 26, R. 233, 234, 235). The first tariff published by the Yards Company remained in effect without change until May 21, 1917, and until that time the railroads continued to pay the charges of the Yards Company provided for therein. This payment was made by the railroads pursuant to the absorption provisions of their own tariffs (See p. 169, Certified Excerpts from Original Exhibits).

Effective May 21, 1917, the Yards Company published its Tariff No. 2, I. C. C. No. 2 (Part of Ex. 1, attached to Defts.' Ex. 1, certified to this court) in which it increased its charge for unloading live stock from 25 cents to 50 cents a car and increased its charge for loading live stock from 50 cents to 75 cents per car. Since the tariffs of the line-haul carriers only provided for the absorption and payment by them of charges of 25 cents and 50 cents a car, the increase in the charges of the Yards Company amounting to 25 cents a car was added to the railroad freight bills and paid by the shippers. This situation existed during the entire period of Federal control, which is the period covered by this suit, and the payments of 25 cents thus made constitute the sum sought to be recovered herein.

Later in 1917, the Yards Company filed with the Commission its Supplement No. 1 to its Tariff No. 3, I. C. C. No. 6, effective September 1, 1917 (Part of Ex. 1 attached to Defts.' Ex. 1, certified to this court), in which it undertook to cancel the tariff containing its increased charges of 50 cents and 75 cents per car for unloading and loading, this action being taken because of the theory of the Yards Company that in performing this service, it was not a common carrier and was not performing a common-carrier service. Had this supplement been permitted to become effective, the Yards Company would no longer have had a tariff on file with the Commission stating its

charges for loading and unloading. The supplement, however, was suspended by the Commission and thus prevented from becoming effective. The proceeding which resulted from its suspension was known before the Commission as its Investigation & Suspension Docket No. 1118.

Following this action of the Commission in suspending the proposed cancellation of the tariff charges of the Yards Company for loading and unloading, there was filed with the Commission, upon November 17, 1917, the complaint of the Chicago Live Stock Exchange (Defts.' Ex. 2, R. 243, *et seq.*), which complaint was docketed by the Commission under its Docket No. 9977. The defendants named therein were the Yards Company, the Chicago Junction Railway Company, and 27 line-haul carriers (R. 244).

After setting up the long existence of the 25-cent and 50-cent charges for unloading and loading live stock, the increased charges of 50 cents and 75 cents per car which became effective on May 21, 1917, and the attempt by the Yards Company to cancel its tariff charges for loading and unloading, the complaint generally alleged that the collection from the shipper of any amount for the service of loading and unloading was discriminatory and otherwise unlawful; that the legal duty rested upon the line-haul carriers to load and unload live stock at the stockyards, and that the failure of those carriers to perform this service and their failure to absorb the increased charges of the Yards Company had subjected the members and patrons of the complainant corporation (the Chicago Live Stock Exchange) to the payment of charges for transportation which were in violation of Sections 1, 2 and 3 of the Act to Regulate Commerce.

The complaint concluded with the prayer that the defendant carriers be required to desist from collecting

from complainant's members and patrons any charges for the service of loading and unloading live stock at the stockyards, and that such carriers also be required to pay to complainant's members and patrons, by way of reparation, any amounts which they had been required to pay for such loading and unloading service since the increased charges of the Yards Company had become effective. This complaint did not attack the reasonableness of the increased loading and unloading charges of the Yards Company (See p. 20, Certified Excerpts from Original Exhibits).

It was consolidated with Investigation & Suspension Docket No. 1118, and a hearing in the consolidated case was held by the Commission. The testimony and other exhibits received on this hearing were introduced in the record as Defendants' Exhibits 5 and 6 (R. 268) and 12 to 22, inclusive (R. 271-276). All these exhibits are certified to this court as original exhibits. On this record, the Commission made its first report, dated February 11, 1919, at 52 I. C. C. 209 (Pltfs.' Ex. 1, R. 121, *et seq.*).

In this report, the Commission found that the Yards Company was performing a common-carrier service in loading and unloading live stock; that it should not be permitted to cancel its tariff charges for performing this service; that the duty of loading and unloading live stock at the Chicago stockyards rested upon the shipper and that the failure of the line-haul carriers to absorb the charges did not prejudice shippers to the Chicago stockyards. The complaint was dismissed, and by subsequent order dated March 13, 1919, the Commission required the Yards Company to withdraw its proposed cancellation of its tariff charges for loading and unloading (Par. 33 of Defts.' Ex. 1, R. 237, 243).

With respect to this service, the Commission held that a fair price could be exacted for its performance (R.

136); that no attempt had been made to prove that the charges of the Yards Company were unreasonable (R. 135); and that since the Yards Company, in performing the loading and unloading service, was performing a common-carrier service, its charges therefore should be published with the Commission in tariffs, in compliance with Section 6 of the Act to Regulate Commerce and the appropriate tariff circulars of the Commission (R. 137). In compliance with this decision, the Yards Company withdrew Supplement No. 1 to its Tariff No. 3, in which it undertook to cancel its charges of 50 cents and 75 cents for loading and unloading, and continued to collect these charges (See Par. 33 of Defts.' Ex. 1, R. 237, 243). Thus, the effect of this decision of the Commission was to require the Yards Company to continue to charge and collect its increased tariff charges for loading and unloading live stock, in accordance with its tariff on file with the Commission.

Thereafter, upon petition for rehearing filed by various parties, the Commission reopened its Dockets 1118 and 9977 and held further hearings, the testimony and exhibits introduced on these hearings being introduced in this record as Defendants' Exhibits 7 (R. 269) and 23 to 35, inclusive (R. 276-283). All these exhibits are certified to this court as original exhibits. On this additional record, the Commission issued its further report on July 15, 1920, at 58 I. C. C. 164 (Pltfs.' Ex. 2, R. 141, *et seq.*).

In this report, the Commission reversed its previous finding that it was the duty of the shippers to load and unload live stock at the Chicago yards, and held that this was a duty imposed upon the carriers under the law (R. 144), and that since this service was a part of the transportation of live stock, the collection of separate charges therefor from the shippers in addition to the line-haul

rates was an unlawful and unreasonable practice (R. 145), and that the shippers who paid and bore the charges for such loading and unloading, and who were parties of record to the case, had been damaged and entitled to reparation with interest (R. 146). The Commission also adhered to its previous finding that the Yards Company was a common carrier engaged in interstate commerce (R. 144).

With respect to the loading and unloading charges of the Yards Company, the Commission held that inasmuch as the obligation to load and unload live stock at the Chicago stockyards was included in the line-haul transportation and no extra charge could be made for the service, it was not necessary to pass upon the reasonableness of the established charges of the Yards Company for that service; that it (the Commission) had jurisdiction over those charges and could consider their propriety at any time upon complaint of any party (R. 145). It should be remembered that at the time of this report, and at all times prior thereto, back to May 21, 1917, the increased charges of the Yards Company of 50 cents a car for unloading and 75 cents a car for loading live stock were and had been in effect in a tariff on file with the Commission pursuant to the requirements of the Commission's first report (Pltfs.' Ex. 1, Tr. 121, *et seq.*).

Thereafter, on February 25, 1921, a second complaint was filed by the Chicago Live Stock Exchange and docketed under the Commission's Docket No. 12614 (Defts.' Ex. 3, R. 257, *et seq.*). This complaint named the Director General of Railroads as agent, the Yards Company, and a large number of line-haul railroads as defendants. It contained substantially the same allegations as the prior complaint carried under the Commission's Docket No. 9977, and further alleged that it was filed in order to secure reparation on shipments moving since the date of

the filing of the complaint in Docket No. 9977. It did not attack the reasonableness of the increased loading and unloading charges of the Yards Company.

One hearing was held by the Commission on this complaint, the testimony and exhibits offered being introduced in this record as Defendants' Exhibits 8 (R. 269) and 36 (R. 282). These exhibits are certified to this court as original exhibits. On April 8, 1922, the Commission entered an order (Defts.' Ex. 4, R. 267, 268) reopening Docket 9977 and consolidating it with Docket 12614 for further hearing. This further hearing was held, the testimony and exhibits received thereon being introduced in this record as Defendants' Exhibits 9 to 11, inclusive (R. 270) and 37 to 44, inclusive (R. 283-291). All these exhibits, except Exhibit 44, which is printed in the record (R. 289-291), are certified to this court as original exhibits.

Following these hearings, the Commission made its third report on June 2, 1925, at 100 I. C. C. 266 (Pltfs.' Ex. 3, R. 147, *et seq.*). After stating the issues presented in Dockets 9977 and 12614, this report found that the collection of separate charges from complainants and interveners for loading and unloading live stock at the Chicago Yards, during the periods mentioned, was an unlawful and unreasonable practice (R. 150), and awarded reparation to petitioners, as factors and agents for the shippers. The record being insufficient to determine the amount of that reparation, petitioners were directed to prepare statements in accordance with Rule V of the Rules of Practice of the Commission, for submission to the defendants for verification. If not verified, they were to be filed with the Commission for a check upon the record with a view to the entry of an order awarding reparation. The Yards Company was also authorized to waive the collection of any loading and un-

loading charges provided for by its tariffs and which had accrued but had not been collected (R. 156).

Respondents having refused to verify the Rule V statements referred to by the Commission in its report of June 2, 1925, the Commission, on December 12, 1927, without further hearing, entered the order sued on herein (Pltfs.' Ex. 4, R. 157, *et seq.*). With respect to this order, it was stipulated that this action is to recover only those amounts which are preceded by the designation "U. S. Y. & T. Co. and D. G." for some railroad. The amounts not preceded by the initials "D. G." are not involved (R. 209). That the statements filed with the Commission were not agreed to by respondents appears from a subsequent report and order of the Commission dated May 14, 1928, and entered in Dockets 9977 and 12614 (Pltfs.' Ex. 5, R. 210, *et seq.*).

On November 27, 1928, another order was entered (Pltfs.' Ex. 6, R. 214, *et seq.*), making still further changes in the names of certain members of the Chicago Live Stock Exchange, petitioners here. The foregoing comprises a statement of all the opinions and orders issued or made by the Commission in connection with the litigation. Upon the refusal of respondents to pay the reparation awarded by the Commission, this suit was brought.

These are the essential facts upon which, we submit, the decision of the Circuit Court of Appeals was based, and which should be emphasized to enable this court to pass upon the petition for certiorari. It will be observed that, after all, this suit was brought to recover part of the increased loading and unloading charges collected under that tariff of the Yards Company which became effective May 21, 1917. This tariff actually went into effect, in accordance with the law. The Commission de-

nied the request of the Yards Company for permission to cancel that tariff, and by the order entered in Investigation & Suspension Docket 1118, required that it be kept in full force and effect.

In accordance with the requirement of that order, the Yards Company kept the tariff in effect during the entire reparation period, and under it, the collection of those charges sued for herein was made. In neither complaint filed with the Commission was any attack made upon those charges. No evidence was introduced to prove that they were unreasonable or otherwise in violation of the law. On the contrary, the Commission said in its first report that no attempt had been made to prove the charges unreasonable and in its second report that it was not necessary to pass upon their reasonableness.

Notwithstanding this lack of attack on the charges of the Yards Company, the lack of evidence to prove their unlawfulness and the failure of the Commission to find them illegal, the reparation order sued on herein required the Yards Company to refund part of them. We should add that there was the same lack of evidence to show that the charges of the Director General were illegal and the same lack of any finding to that effect by the Commission. The tariffs containing the line-haul rates on live stock were not even put in evidence and the record does not show the amount of those rates.

SUMMARY OF ARGUMENT.

I.

The petition filed herein assigns no reason justifying the issuance of a writ of certiorari. Most of the questions said to have been decided by the Circuit Court of Appeals were not decided by that court. This affirmatively appears from the opinion of that court. Other matters mentioned in the reasons assigned for the issuance of the writ relate to matters which are unimportant and which were not the basis of the opinion of the Circuit Court of Appeals.

II.

The decision of the Circuit Court of Appeals and the grounds assigned therefor, as they appear in the opinion of that court, furnish no justification for the issuance of a writ of certiorari. That court decided the case in accordance with many decisions of this court, and it is not argued in the petition for certiorari or brief in support thereof that the conclusion of the Court of Appeals, on the ground assigned by it in its opinion, was wrong.

III.

A petition for certiorari will not be granted except under the circumstances named in Rule 38 of this court. The decision of the Circuit Court of Appeals herein presents no question of public interest, no conflict with any other Circuit Court of Appeals, does not constitute a departure from accepted judicial procedure and is not in contravention of decisions of this court. On the contrary it is in accord with many decisions of this court.

ARGUMENT.

I.

THE REASONS RELIED UPON BY PETITIONERS AS JUSTIFYING THE GRANTING OF THE WRIT ARE INSUFFICIENT.

At pages 13 to 19, inclusive, of the petition herein, there is a statement of the reasons relied upon by petitioners for the allowance of the writ. They take the form of statements that the Circuit Court of Appeals erroneously decided certain questions in the case and otherwise erred in making its decision. We may deal with these matters in order.

(1) In the statement of the first reason relied upon for allowance of the writ (p. 13 of the petition), it is said that the Circuit Court of Appeals has held that where a carrier holds itself out in its published tariffs to transport live stock under through rates which include the unloading of such stock, it may collect from the shipper an extra charge for part of the unloading service, using as authority therefor a tariff filed by its agent, and without amending its own tariffs which purport to cover the entire service. The opinion of the Circuit Court of Appeals (R. 389-399) shows on its face that this question was not passed upon, and that it was not an issue before that court.

The statement is also based upon a mistake in fact, since the Director General never held himself out in his published tariffs as being willing to transport live stock and unload it at the Chicago stockyards at the through rate published by him. The tariffs of the Director General, said to contain this undertaking are not even in

the record. Up to May 21, 1917, when the increased loading and unloading charges of the Yards Company became effective, the total charge against a shipper did consist of the line-haul rate, plus the terminal charge of $2 a car, but this resulted from the fact that the absorptions of the line-haul carriers for loading and unloading exactly equalled the tariff charge made by the Yards Company for the service. Subsequent to May 21, 1917, the lawful tariff charge against a shipper for the transportation and the loading or unloading, consisted of the line-haul rate, the $2.00 terminal charge and a 25 cent charge for loading or unloading. The statement is also based upon the assumption that the Yards Company was the agent of the line-haul carriers, a matter to which we shall hereafter refer.

(2) In the second reason relied upon for allowance of the writ (pp. 13 and 14 of petition), it is said that the Circuit Court of Appeals has held that a common carrier may not publish its tariffs as agent for another carrier, and restrict the making of charges thereunder against another common carrier. The decision of the Circuit Court of Appeals shows that this question was not presented to or decided by that court. The tariffs of the Yards Company on file with the Commission during the period of Federal Control, and stating the increased loading and unloading charges, did carry the statement that the charge of the Yards Company was made "as a carrier's agent" (p. 165, Certified Excerpt from Original Exhibits). During the hearings in Investigation & Suspension Docket 1118, the Yards Company did contend that it acted as the agent of the line-haul carriers in loading and unloading stock at the yards, this position being taken to support its claim that it was not performing a common-carrier service in doing this work. In its

first decision (Pltfs.' Ex. 1, R. 137), the Commission said:

> "It is contended that the loading and unloading services are performed by the Yards Company as the carrier's agent, and that its charges, therefore, need not be filed under Section 6 of the Act, whether or not it is a common-carrier in respect to such service."

The Commission, however, held that the Yards Company was a common carrier and was obliged by law to file tariffs stating the charges assessed by it for the common-carrier service of loading and unloading live stock performed by it. We do not concede that the Stock Yards Company was then or is now performing a common-carrier service on its own behalf, in loading and unloading live stock at the stockyards, but the Commission held that it was. It necessarily follows that if the Stock Yards Company was performing a common-carrier service on its own behalf in loading and unloading live stock at the yards, it was performing a service on a shipment in the course of transportation, and that the charges for such service constituted a charge against the shipment and not against a connecting carrier. Under these circumstances, it could not be acting as the agent of another carrier. Otherwise, any common carrier might restrict its tariffs so as to apply to only one party to a shipment, thus relieving other parties of obligations imposed upon them by law.

(3) In the third reason relied upon by petitioners for the allowance of the writ (p. 14 of petition), it is said that the Circuit Court of Appeals has in effect held that the through Chicago rate of the Director General, plus the $2.00 terminal charge which covered the transportation and the unloading, is superseded by the absorption clause published in the tariffs of the Director

General, but which did not absorb all of the loading and unloading charges of the Yards Company. The opinion of the Circuit Court of Appeals shows that this question was not passed upon by that court. The statement is also based upon an erroneous statement of fact. As we have pointed out, the line-haul rates to Chicago constituted no engagement with respect to unloading. Moreover, there is no question of an absorption tariff superseding any other tariff. The absorption tariff of the Director General only provided for the payment of a charge which the shippers would otherwise have had to pay in addition to what they did pay.

(4) In the fourth reason relied upon for the allowance of the writ (pp. 14, 15 of petition) it is said that the Circuit Court of Appeals erred in substituting its judgment for that of the Commission in holding that the classifications in the published tariffs of the line-haul carriers were controlling over the line-haul rates and said $2.00 charge. All that can be said with respect to this statement is that the Circuit Court of Appeals did not pass upon the question stated. It made no holding with respect thereto, except to point out that certain provisions of the line-haul Classifications supported a conclusion already reached on other grounds. The statement of the Commission, quoted in this paragraph, was only a statement of fact conceded by everybody and not denied by the Circuit Court of Appeals.

(5) In the fifth reason for the allowance of the writ (p. 16 of petition), it is said that the Circuit Court of Appeals refused to accept the finding of fact made by the Commission with respect to the duty of the line-haul carriers to unload live stock at the stockyards at Chicago and erred in substituting its judgment for that of the Commission on that subject. It is plain that the Cir-

cuit Court of Appeals did not base its decision on a conclusion as to who should load or unload live stock at Chicago. In any event, the determination of this question was a matter of law within the jurisdiction of the court, since the facts, as stated by the Commission in its second report (R. 144), were not in dispute.

(6) In the sixth reason relied upon for the allowance of the writ (pp. 16 and 17 of petition), it is said that the Circuit Court of Appeals erred in finding that the Stock Yards Company, in effect, collected the charge sued for. This is scarcely a reason for the allowance of a writ of certiorari, and in any event, the question as to who collected the money is not now of importance. The decision of the Court of Appeals was not based to any extent upon its statement as to who actually collected the money from the shipper or consignee. The decision was based upon the fact that the collection, no matter by whom made, was lawful.

(7) In the seventh reason relied upon for the allowance of the writ (pp. 17 and 18 of petition), it is said that the Circuit Court of Appeals erred in holding that the increased charge of 25 cents per car was justified by reason of the increased loss of labor and other expenses in connection with the unloading of live stock. The opinion of the Circuit Court of Appeals shows that it made no such decision. The court did say (R. 397) that it knew judicially of the increased cost of service at the Chicago stockyards and (R. 398) that this increased cost was properly the subject of an increased charge. The court did not, however, pass on the reasonableness of the charge made, since that charge was provided for by tariff during all the reparation period, and had been kept in effect by order of the Commission itself.

(8) The eighth reason relied upon for the allowance

of the writ (p. 18 of petition) is that the decision of the District Court in this case was wrong, in that it is in conflict with decisions of the Commission, is contrary to decisions of this court, and is in conflict with the decisions of other district courts. We submit that the decision of the District Court, even if subject to these objections, may not be relied upon as a reason for the allowance of a writ herein. As appears from the opinion of the District Court (R. 60, *et seq.*), the ground for the decision of that court was that petitioners were not the proper parties in interest, and had no legal right to maintain the action. The Circuit Court of Appeals, however, did not sustain the judgment of the District Court on this ground, saying (R. 394):

> "Our examination of this cause does not so entirely satisfy us of the correctness of the District Court's conclusion thereon as to justify our deciding the appeal upon a ground so formal and technical if a proper result may be reached upon the merits of the cause."

The writ, if granted herein, will be granted to review the judgment of the Circuit Court of Appeals and not the judgment of the District Court. The basis of the action taken by the District Court is of no importance here. That action was, however, right.

II.

THE OPINION AND DECISION OF THE CIRCUIT COURT OF APPEALS AFFORDS NO GROUND FOR A PETITION FOR CERTIORARI.

None of the reasons assigned by petitioners in support of the petition touch upon the actual ground of the decision made by the Circuit Court of Appeals. What that court held was that since neither respondent had collected any amounts in excess of the charges author-

ized by its tariffs, lawfully on file with the Interstate Commerce Commission, and since there was no finding by the Commission that any charge collected by either respondent was unreasonable or otherwise improper, there could be no recovery. This conclusion is demonstrated by the language of the opinion where it is said (R. 396, 397):

> "Whatever the form of the transaction, it seems to us to have been, in essence, but a collecting of the 25 cents by the Stock Yard Co., which, under its published tariff, it was bound in any event to collect. No one was taken by surprise or deceived. The rate had been duly published and shippers or their representatives, the commission men, knew of this charge, and that the Stock Yard Co. would be obliged in some manner to collect it.
>
> No contention is made that the charge itself was unreasonable, or that, taken in connection with the other transportation charges, the entire rate was unreasonable. The extent of the Commission's second conclusion was that the collection of the increased 25 cents was 'an unlawful and unreasonable practice.' The finding that it was an unreasonable practice is not a finding that it was an unreasonable rate."

Further on, referring to the same point, the court said (R. 399):

> "Appellants earnestly urge that the collection of this charge was a tort, and that all participants therein were joint tort feasors. We cannot believe that the Stock Yard Co. committed a tortious act in collecting and receiving its tariff charge, the failure to collect and receive which would have been a breach of its statutory duty. Nor do we understand how the Director General of Railroads became a tort feasor through his continuing the prior practice of receiving from the Stock Yard Co. the entire rate, including the additional loading and unloading charges, and then turning back to the Stock Yard Co. that part of the total charge to which it was entitled. Particularly is this so when there is no pretense that either the charge itself or the entire rate including this charge was excessive."

These quotations state the ground upon which the decision of the Circuit Court of Appeals was based, and petitioners do not urge the action of the court in this respect as a reason for the allowance of the writ. On the contrary, it seems to be conceded in the petition and brief that the collection of the charges of the Yards Company was proper. That this is so cannot be denied. If the Yards Company was a common carrier in performing the loading and unloading service, as the Commission held, Section 6 of the Act to Regulate Commerce imposed a positive duty upon it to file its charges in tariff form with the Commission. *U. S.* v. *U. S. Y. & T. Co.*, 192 Fed. 330; 226 U. S. 286.

Its tariffs being thus filed, the law required it to collect and retain all its charges. *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 186; *Armour & Co.* v. *United States*, 209 U. S. 56; *Davis* v. *Portland Seed Co.*, 264 U. S. 403, 418, 425. Nor could the Commission require any refund of charges so collected, unless it first found, on a proper record, that the charges were unreasonable or otherwise unlawful. *Baltimore & Ohio R. Co.* v. *United States*, 277 U. S. 291, 301, 302; *F. E. C. Ry.* v. *United States*, 234 U. S. 167. No such finding was made by the Commission in this case with respect to any charge of the Yards Company or the Director General.

Nor may it be argued that the collection of the charges of the Yards Company was the practice condemned by the Commission. The language of the Commission's reports negatives any such conclusion. Moreover, this court has held that a practice may not be condemned by the Commission without evidence that it is unjust and unreasonable. *B. & O. Ry.* v. *United States*, 277 U. S. 291, 300. Certainly, the practice of collecting the charges of the Yards Company could not have been an "unlawful and unreasonable practice", since those charges were

contained in tariffs filed with the Commission as required by the Commission, and had not been held to be in any way unlawful.

Under these circumstances, the case presented to the Circuit Court of Appeals was the same in principle as the case presented to this court in *Interstate Commerce Commission* v. *Stickney, et al.*, 215 U. S. 98. That case involved the propriety of the $2.00 terminal charge assessed by the Yards Company for the use by the line-haul railroads of the railroad that the Yards Company then owned, and which charge had been added by the railroads to their line-haul charges on live stock. In the prior proceedings before the Commission the propriety of the $2.00 charge had been demonstrated, notwithstanding which the Commission entered an order requiring the railroad companies to reduce the charge against the shipper to $1. This court said at page 109:

> "Under those circumstances it seems impossible to avoid the conclusion that, considered of and by itself, the terminal charge of $2 a car was reasonable. If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards it would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced the Union Stock Yards Company will suffer loss while the real wrongdoers will escape. It may be that it is more convenient for the commission to strike at the terminal charge, but the convenience of commission or court is not the measure of justice."

This language is applicable to the case at bar. If petitioners were permitted to recover, the charges of the Yards Company will be reduced, and that company will suffer loss, although those charges have not been held improper. On the contrary, the Yards Company maintained

them in effect only because required by the Commission to do so. It follows that the reparation order of the Commission, sued on herein, was bad for the reason assigned in the opinion of the Circuit Court of Appeals.

It is obvious from the various reports of the Commission that what that body was trying to do in this case was to require the absorption of the increased charges of the Yards Company by the line-haul carriers. This was the specific relief asked for in the complaint filed in Docket 9977, and was the issue dealt with in the Commission's first report. Such an absorption by the line-haul carriers would have been a complete compliance with the finding of the Commission that the collection of a part of the Yards Company's charges from the shippers, in addition to the rates for transportation, was an unreasonable and unlawful practice. Under such a disposition of the matter, the Yards Company would have collected and retained its charges in accordance with the Commission's conclusions with respect thereto, but the shippers would not have been required to pay any part of them.

This conclusion is strengthened by the fact that on February 29, 1920, there became effective that amendment to Section 15 of the Act to Regulate Commerce which required the payment of the charges of the Yards Company by the line-haul carriers, a circumstance referred to by the Commission in its second report dated July 15, 1920 (Pltfs.' Ex. 2, R. 143). This also is the thought that runs through the petition and brief in support thereof filed herein. The entire argument made to this court is that the Director General should be required to pay the increased charges of the Yards Company, there being no contention that the retention and collection of those charges by the Yards Company was improper.

Whether or not this is a thing that may be lawfully

done directly concerns the Director General, but we call attention to the fact that there is no order of the Commission finding any impropriety or unreasonableness in any charge for transportation assessed by the Director General, no finding of any discrimination resulting from his failure to absorb the charges of the Yards Company, and no conclusion or finding that he should make this additional absorption. In the absence of such findings, it would seem clear that no such requirement could be imposed upon the Director General in the courts.

III.

THE PETITION HEREIN URGES NO REASON OR GROUND JUSTIFYING THE GRANTING OF A WRIT OF CERTIORARI.

Paragraph (b) of Rule 38 of this court specifies the grounds upon which this court will grant a writ of certiorari to a Circuit Court of Appeals, and the grounds mentioned therein have been considered by this court in a number of adjudicated cases. If this case does not present a ground specified by the rule as justifying the issuance of the writ, the petition will be denied.

As we have pointed out, the opinion of the Court of Appeals does no more than hold that when the tariffs of common carriers lawfully on file with the Commission specify the charges to be collected for transportation service performed thereunder, those charges must be collected and retained, and that an order of the Commission requiring a refund of them is invalid in the absence of a finding of impropriety or illegality in the collection and retention of such charges. This is not a new principle of law, since, as we have pointed out, it has been affirmed and reaffirmed by this court in many decided cases.

The decision of the Circuit Court of Appeals herein is not in conflict with the decision of any other Circuit Court of Appeals, but is in accord with many decisions of this court. It does not decide an important question of local law in any way, since, as appears from the petition (p. 3), the law involved is a Federal law. It has not decided an important question of general law in a way in conflict with the weight of authority, since its opinion is supported by many decisions of this court. It has not decided an important question of Federal law which has not been, but should be, settled by this court, since the grounds upon which the Court of Appeals has decided the case are grounds which have been repeatedly recognized and approved by this court. It has not departed from the accepted and usual course of judicial procedure or sanctioned a departure therefrom by the lower court. On the contrary, it has done nothing more than decide this case in accordance with what is by now "horn book" law.

The circumstances under which a petition for certiorari will be granted are well set out in decisions of this court. In *United States* v. *Rimer*, 220 U. S. 547, a writ which had been granted on the theory that the rule established by the lower court would overthrow established practices was dismissed when it appeared that the ground upon which it was granted did not exist. In this case no established rule is or could be overthrown by the decision of the lower court. The obligation of railroads to load and unload live stock at public markets has been fixed by statute since March 1, 1920. In *Layne, etc. Company* v. *Western Wells Work*, 261 U. S. 387, the writ of certiorari was dismissed by this court as having been improvidently granted, on the ground that the question involved was not one of importance to the public and did not present a conflict of opinion as between Circuit Courts of Appeal.

This case is of no importance except to the parties and presents no such conflict. In *Magnum Company* v. *Coty*, 262 U. S. 159, this court said at page 163:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The case at bar presents no disagreement between Circuit Courts of Appeal and involves no question of any importance to the public. In *Southern Power Company* v. *North Carolina, etc. Company*, 263 U. S. 508, the writ of certiorari previously granted was dismissed when it appeared that the cause did not involve a question of importance to the public. In *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314, a patent case, the writ of certiorari was dismissed because the case presented no important issue of general patent law.

These decisions of this court would seem to control in the case at bar, which, as we have said, presents no question of public interest, involves no disagreement between Circuit Courts of Appeal and is in fact, nothing more than an ordinary action at law between private parties. Petitioners' complaint in effect is that they lost the case and what they desire is another hearing in this court.

We submit that the petition for certiorari should be denied.

Respectfully submitted,

SILAS H. STRAWN,
RALPH M. SHAW,
FRANK H. TOWNER,
Counsel for said Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,

Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC., ET AL.,

Respondents.

BRIEF FOR RESPONDENT, UNION STOCK YARD & TRANSIT COMPANY OF CHICAGO.

SILAS H. STRAWN,
RALPH M. SHAW,
FRANK H. TOWNER,
Counsel for said Respondent.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

PAGE

Statement 1

Summary of Argument 20

Argument:

Point I—The order of the Commission sued on in this case will not be sustained and is invalid unless it is supported by evidence and is not contrary to law. The prima facie effect of the order sued on may be rebutted, either by the evidence submitted to the Commission or by evidence submitted in court..... 25

Point II—The appeal herein is from the judgment of the lower court and not from its opinion. The judgment will not, therefore, be reversed, if it may be sustained on the ground mentioned in the opinion of the Circuit Court of Appeals or for any other reason..... 27

Point III—Under the theory of the law adopted by the Commission, the Yards Company was obligated to file with the Commission its tariff containing its charges for loading and unloading live stock. If this was so, the law required the Yards Company to assess, collect and retain those charges. The reasonableness and propriety of those charges was not in issue in any proceeding before the Commission, and they have never been condemned by the Commission. Notwithstanding this, the order sued on herein operated to reduce those charges and is, therefore, unlawful and void.. 29

(1) The character of the charge collected 39
(2) The alleged wrong complained of by petitioners 40
(3) The alleged agency of the Yards Company 42
(4) The alleged determination by the Circuit Court of Appeals of the Reasonableness of the Yards Company charges 43
(5) The absorption of the Yards Company charges by the Director General 44

Point IV—The duty to load and unload live stock at the stockyards was an obligation of the shipper or consignee. The Commission's finding to the contrary was not supported by the evidence and is contrary to law..... 46

Point V—Claims for reparation before the Interstate Commerce Commission and suits in court must be brought in the names of the real parties in interest. Who may maintain a suit is a matter of law. Petitioners do not have such an interest as entitles them to maintain this suit, either in their own behalf or as factors in behalf of the shippers. They neither paid nor bore the charges sued for and were not damaged and cannot recover... 53

A. This suit is brought by petitioners in their own name and right..... 54
B. All claims must be prosecuted in the name of the real party in interest... 58
C. Petitioners have no interest in fact in the charges herein sued for..... 59

D. Petitioners were not damaged by the collection of the charges sued for and cannot recover in this case. They are not the parties in interest..... 65

E. Petitioners cannot recover in this case as factors or agents for the shippers 79

Point VI—The order sued on awards reparation against the Yards Company on intrastate Illinois shipments, and is, therefore, invalid as to it, since the Commission had no jurisdiction to award such reparation..... 85

Point VII—The Commission was without jurisdiction to award reparation against the Yards Company in its Docket No. 9977, and having done so, its order of December 12, 1927, sued on herein, is void and no recovery can be had against the Yards Company thereon..... 89

Point VIII—The Commission did not have before it any competent evidence upon which it could determine the amount of the reparation awarded by it and the order awarding such reparation is therefore void..... 96

Point IX—The reparation award here sued on is void because the Commission, in making it, considered evidence not in the record before it 105

Conclusion 108

Cases Cited.

Arizona Grocery Co. v. A. T. & S. F. R. Co., 52 Sup. Ct. Rep. 183 45
Allied Packers v. A. T. & S. F. R. Co., 161 I. C. C. 641 48
Armour & Co. v. United States, 209 U. S. 56 34
A. T. & S. F. R. Co. v. United States, 232 U. S. 199 .. 34
Assigned Car Cases, 274 U. S. 564 34

Brace v. Construction Co., 36 Fed. (2nd) 661 28
Beardsley v. Schmidt, 120 Wis. 405 (98 N. W. 235) . 81
B. & O. R. Co. v. United States, 277 U. S. 291 35
Burgess, et al. v. Transcontinental, etc., Bureau, 13 I. C. C. 668 ..... 66, 67

Covington, etc., Co. v. Kieth, 139 U. S. 129 50
Consolidated Cut Stone Co. v. A. T. & S. F. R. Co., 39 Fed. (2nd) 661; 47 Fed. (2nd) 226; 283 U. S. 843 74
Comp v. Gress, 250 U. S. 308 28
City of Newark v. Mills, 35 Fed. (2nd) 110 28
Clinton, etc., Co. v. Cochran, 247 Fed. 449 28
Chicago Junction Case, 264 U. S. 258 ..... 34, 106
C. R. I. & P. R. Co. v. United States, 274 U. S. 29 ... 106

Danzer v. G. & S. I. R. Co., 268 U. S. 633 94
Dinsmore v. Southern Express Co., 183 U. S. 115 ... 28
Davis v. Portland Seed Co., 264 U. S. 403 ..... 34, 73
Darnell-Taenzer Co. v. So. Pac. Co., 190 Fed. 659; 221 Fed. 890 66

F. E. C. R. Co. v. United States, 234 U. S. 167 35
Fitken v. Century Oil Co., 16 Fed. (2nd) 22 58

G. N. R. Co. v. Merchants Elevator Co., 259 U. S. 285 34
General, etc. Co. v. Southern R. Co., 169 I. C. C. 83 .. 71

Hamilton v. Dillin, 11 Fed. Cas. 332..... 80

Interstate Commerce Commission v. L. & N. R. Co., 227 U. S. 88..... 106
Interstate Commerce Commission v. Stickney, 215 U. S. 98 .....36, 77
Interstate Commerce Commission v. C. B. & Q. R. Co., 186 U. S. 320.....37, 46
Ill. Cent. R. Co. v. Vest, 39 Fed. (2nd) 658..... 70

Knudson, etc., Co. v. M. C. R. Co., 148 Fed. 968....38, 73
Keogh v. C. & N. W. R. Co., 260 U. S. 156.....41, 43
K. C. S. R. Co. v. United States, 252 U. S. 178..... 77
K. C. S. R. Co. v. Wolf, 261 U. S. 133..... 94
Krauss Bros. v. Mellon, 18 Fed. (2nd) 369..... 26

Lewis-Hall Iron Works v. Blair, 23 Fed. (2nd) 972.. 28

L. & N. R. Co. v. Sloss-Sheffield Co., 269 U. S. 217 .....69, 72, 77
L. & N. R. Co. v. Central Iron Works, 265 U. S. 406.41, 43
L. & N. R. Co. v. Maxwell, 237 U. S. 94..... 41

Mackay v. Randolph-Macon Coal Co., 178 Fed. 881.. 58
Missouri Portland Cement Co. v. Director-General, 88 I. C. C. 492.....65, 71
Memphis Freight Bureau v. St. L. S. F. R. Co., 57 I. C. C. 212..... 82
Michigan Hardwood Mfgrs. Ass'n. v. Freight Bureau, 27 I. C. C. 32..... 91
Missouri & Kansas Shippers Ass'n. v. A. T. & S. F. R. Co., 13 I. C. C. 411..... 91
Meeker v. L. V. R. Co., 236 U. S. 412..... 26
Manufacturers R. Co. v. United States, 246 U. S. 457 .....32, 34

N. P. R. Co. v. Solum, 247 U. S. 477 34
North American Co. v. St. L. S. F. R. Co. (Unreported Opinion) 82
N. Y. N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361 93
N. Y. C. R. Co. v. York & Whitney, 256 U. S. 406 ..42, 76
Nicola, etc., Co. v. L. & N. R. Co., 14 I. C. C. 199 67

Phillips v. G. T. W. R. Co., 236 U. S. 663 .....59, 94
Parsons v. C. & N. W. R. Co., 167 U. S. 447 72
Progress Blue Ribbon Farms v. Chicago, etc., Co., 153 Wis. 249, (140 N. W. 1132) 81
Pacific Lumber Co. v. N. W. P. R. Co., 51 I. C. C. 738 87
Penna. R. Co. v. International Coal Co., 230 U. S. 184 .....33, 35, 43, 73

Sloss-Sheffield Co. v. L. & N. R. Co., 60 I. C. C. 595. 69
Sloss-Sheffield Co. v. L. & N. R. Co., 295 Fed. 57.... 69
Southern Pine Lumber Co. v. So. Pac. Co., 14 I. C. C. 195 73
Spiller v. A. T. & S. F. R. Co., 253 U. S. 117.... .....56, 59, 73, 82, 102
So. Pac. Co. v. Darnell-Taenzer Co., 245 U. S. 531 .....65, 68, 72, 77
Southwestern, etc., Co. v. A. T. & S. F. R. Co., 129 I. C. C. 730..... 51
Smith & Sons v. Blohm, 159 Ia. 592 (141 N. W. 32).. 80

United States v. Abilene & S. R. Co., 265 U. S. 274.. 106
United States v. U. S. Y. & T. Co., 226 U. S. 286..4, 29, 33
United States v. Heinrich, 16 Fed. (2nd) 112..... 28
United States v. U. S. Y. & T. Co., 192 Fed. 330.... 33

Virginian R. Co. v. United States, 272 U. S. 658.... 34

Western Chemical Co. v. United States, 271 U. S. 268 34
Willamette, etc., Co. v. B. & O. R. Co., 29 Fed. (2nd) 80 26
Y. & M. V. R. Co. v. Mullins, 249 U. S. 531 28

STATUTES CITED.

Act to Regulate Commerce:
Section 1(2), U. S. C. A., Tit. 49, Sec. 1 to 15a, pp. 32, 33 86
Section 1(6), U. S. C. A., Tit. 49, Sec. 1 to 15a, p. 79 35
Section 6(1), U. S. C. A., Tit. 49, Sec. 1 to 15a, pp. 240, 241 32
Section 7(6) and 7(7), U. S. C. A., Tit. 49, Sec. 1 to 15a, pp. 282, 283 41
Section 8, U. S. C. A., Tit. 49, Sec. 1 to 15a, pp. 316, 317 72
Section 13, U. S. C. A., Tit. 49, Sec. 1 to 15a, pp. 377, 378 86
Section 15(5), U. S. C. A., Tit. 49, Sec. 1 to 15a, p. 426 ..... 38, 47
Section 16(2), U. S. C. A., Tit. 49, Sec. 16 to end, p. 16 26
Section 16(3), U. S. C. A., Tit. 49, Sec. 16 to end, pp. 28, 29 93
Federal Control Act:
Section 10, 40 Stat. 451, 456-457 35
Transportation Act:
Section 206(c) and 206(f), U. S. C. A., Tit. 49, Sec. 16 to end, pp. 357, 358 ..... 86, 94

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581.

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,

Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC., ET AL.,

Respondents.

BRIEF FOR RESPONDENT, UNION STOCK YARD & TRANSIT COMPANY OF CHICAGO.

STATEMENT.

MAY IT PLEASE THE COURT:

This suit was brought by petitioners against the Director General of Railroads, as agent for a large number of railroad companies (hereinafter called the Director General), and the Union Stock Yard and Transit Company of Chicago (hereinafter called the Yards Company), in the District Court of the United States for the Northern District of Illinois, Eastern Division, un-

der Section 16, paragraph 2, of the Interstate Commerce Act (41 Stat. L. 491), to recover the sum of $140,001.25, which amount had been awarded to petitioners by the Interstate Commerce Commission (hereinafter called the Commission), as reparation on account of the collection by respondents of certain charges for loading and unloading live stock at the Union Stock Yards in Chicago. In addition, the declaration asked for interest on the amount of the award at 6 per cent per annum and a reasonable attorney's fee. Petitioners are commission men and firms at the Union Stock Yards in Chicago, buying and selling live stock on commission, and are members of the Chicago Live Stock Exchange, a corporation.

Upon the trial in the District Court, the court directed a verdict in favor of the defendants (respondents here) on the ground that the plaintiffs (petitioners here) were not the parties damaged by the collection of the charges assailed and that they could not recover, either in their own names or as factors and agents for the shippers. Many other defenses were also urged by both respondents, but the court did not find it necessary to deal with them. The opinion in the trial court is reported at 39 Fed. (2d) 80, and is printed at pages 60 to 77, inclusive, of the record. There was a subsequent memorandum opinion of the District Court dealing with a motion to amend the petition, filed by petitioners after judgment in the District Court. It is printed at pages 112 to 118 of the record. The motion to amend was denied but no point is made in this court of that action.

Upon appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment of the District Court was affirmed. The opinion of the Circuit Court of Appeals is reported at 51 Fed. (2d) 620, and is printed at pages 389 to 399 of the record. The judgment of the District Court was not affirmed on the ground assigned in the

opinion of that court, but on the ground that since neither defendant (respondent) had collected any amount in excess of those authorized by their tariffs on file with the Commission, and since the Commission had not found that any charge collected by either defendant (respondent) was unreasonable or otherwise improper, there could be no recovery. The same defenses to the action were urged in the Court of Appeals as in the District Court, but the latter court also found it only necessary to deal with one of them. A writ of certiorari was granted by this court on January 25, 1932. (R. 413.)"

The proceedings before the Commission covered the period from May, 1917 to November, 1928. Some thousands of pages of evidence were taken by the Commission and many exhibits were introduced in the hearings before it. No less than six reports and orders were made by the Commission in the process of attempting to dispose of the issues presented to it. All of this record, so made before the Commission, was introduced upon the trial of this cause in the lower court and is before this court, either in the printed record or as original exhibits. The statement of facts contained in petitioners' brief is not sufficiently complete to inform this court with respect to the basis in fact for some of the contentions made by the Yards Company, and in some respects is incorrect. We shall, therefore, supplement and somewhat enlarge that statement.

In 1867, shortly after its organization, the Yards Company installed a charge of 50 cents per car for loading all live stock shipped from the yards and a charge of 25 cents per car for the unloading of each carload. In both cases, the service was performed by employees of the Yards Company, which also owned the platforms, chutes and other facilities used. These charges were paid to the Yards Company

by the railroads handling live stock into and out of the yards, from the time they were first established until January 1, 1919, and were not collected by the railroads from the shippers or consignees. (R. 124.) Prior to 1897 the Yards Company also owned and operated the railroad which served the stockyards, but after this railroad was leased to the Chicago Junction Railway in 1897, the only service performed by the Yards Company with respect to the live stock, and here in issue, was the loading and unloading service.

Up to the time of the decision in *U. S. v. U. S. Y. & T. Co.*, 226 U. S. 286, the loading and unloading charges of the Yards Company had not been contained in any tariff filed with the Commission, but after that decision, the Yards Company published and filed with the Commission its Tariff No. 1, I. C. C. No. 1, stating its charges of 25 cents and 50 cents per car for unloading and loading live stock at the stockyards in Chicago. (Part of Ex. 1, attached to Deft's. Ex. 1, certified to this court.) This tariff remained in effect without change until May 21, 1917, and the railroads continued to pay the charges of the Yards Company provided for therein, under authority of absorption provisions contained in their own tariffs.

At all times, the only service performed by the Yards Company was the actual loading and unloading. All inbound shipments were brought by the line-haul railroads to the unloading chutes of the Yards Company. Upon the placement of the car at the chutes, the live stock in the car was unloaded by employees of the Yards Company into pens owned by and located upon property of the Yards Company. For this service, the 25-cent charge was made. In the case of outbound traffic, the empty car was placed at the loading chutes of the Yards Company and the stock was loaded by its employees.

For this service, the 50-cent charge was made. In no case did the Yards Company perform any service in actually moving the live stock in transportation.

Early in 1917, the Yards Company published its Tariff No. 2, I. C. C. No. 2, which became effective May 21, 1917, and in which it increased its charge for unloading live stock from 25 cents to 50 cents a car and increased its charge for loading live stock from 50 cents to 75 cents per car. (Part of Ex. 1 attached to Deft's. Ex. 1, certified to this court.) Inasmuch as the tariffs of the line-haul carriers only provided for the absorption and payment by them of the lower charges of 25 cents and 50 cents a car, the increase in the charges of the Yards Company of 25 cents per car, was added to the railroad freight bills and paid by the shippers. This situation immediately caused trouble, as the shippers objected to the payment of the additional charge.

Later in 1917, the Yards Company filed with the Commission its Supplement No. 1 to its Tariff No. 3, I. C. C. No. 6, effective September 1, 1917 (part of Ex. 1 attached to Deft's. Ex. 1, certified to this court), in which it undertook to cancel the tariff containing its charges of 50 cents and 75 cents per car for unloading and loading. Had this supplement been permitted to become effective, the Yards Company would no longer have had any tariff on file with the Commission stating its charges for loading and unloading. The tariff, however, was suspended by the Commission and was thus prevented from becoming effective; the proceeding which resulted from the suspension of the tariff being known before the Commission as its Investigation & Suspension Docket No. 1118.

Following this action of the Commission in suspending the proposed cancellation of the tariff charges of the Yards Company, there was filed with the Commis-

sion, on November 17, 1917, the complaint of the Chicago Live Stock Exchange (Defts'. Ex. 2; R. 243), which complaint was docketed by the Commission under its Docket No. 9977. This complaint named 27 line-haul carriers, the Chicago Junction Railway Company and the Yards Company as defendants. (R. 244.) The complainant was described as being an association of persons, firms and corporations incorporated under the laws of Illinois, its membership consisting of live stock commission merchants, doing business at the stockyards in Chicago, and it was stated that the complaint was brought on behalf of the members of the complainant, severally and collectively. (R. 245.)

After setting up the long existence of the 25-cent and 50-cent charges for unloading and loading live stock, the increased charges of 50 cents and 75 cents per car which became effective on May 21, 1917, and the attempt by the Yards Company to cancel its tariff charges for loading and unloading, the complaint generally alleged that the collection from the shipper of any amount for the service of loading and unloading was discriminatory and otherwise unlawful; that the legal duty rested upon the line-haul carriers to load and unload such stock at the stockyards, and that the failure of the line-haul carriers to absorb the increased charges of the Yards Company had subjected the members and patrons of the complainant corporation to the payment of charges for transportation that were in violation of Sections 1, 2 and 3 of the Act to Regulate Commerce.

This complaint concluded with a prayer that the defendant carriers be required to desist from collecting from complainant's members and patrons any charges for the service of loading and unloading live stock at the stockyards, and that such defendant carriers also be required to pay to complainant's members and pa-

trons, by way of reparation, any such amounts that they had been required to pay since the increased charges of the Yards Company had become effective. This complaint was consolidated with Investigation & Suspension Docket No. 1118 for hearing, the transcript of the evidence before the Commission on the hearings being introduced in the lower court as Defendants' Exhibits 5 and 6. (R. 268.) Defendants' Exhibits 12 to 22, inclusive (R. 271 to 276) are all the exhibits offered in these hearings before the Commission. On this record, the Commission made its first report, dated February 11, 1919, at 52 I. C. C. 209. (Pltfs'. Ex. 1, R. 121.)

On this report, the Commission found that the Yards Company was performing a common-carrier service in loading and unloading live stock; that it should not be permitted to cancel its tariff charges for performing this service; that the duty of loading and unloading live stock at the stockyards rested upon the shipper and that the failure of the line-haul carriers to absorb the charges of the Yards Company did not prejudice shippers to the Chicago stockyards. The complaint was therefore dismissed, and by subsequent order dated March 13, 1919, the Commission required the Yards Company to withdraw its proposed cancellation of its tariff charges for loading and unloading. (Par. 33 of Defts'. Ex. 1, R. 237, 243.) The effect of this decision was to require the Yards Company to continue to charge and collect its tariff charges of 50 cents and 75 cents per car for its unloading and loading service.

With respect to the service, the Commission held that a fair price could be exacted for its performance (R. 136); that no attempt had been made to prove that the charges of the Yards Company were unreasonable (R. 135); and that since the Yards Company in performing the loading and unloading service was performing a

common-carrier service, its charges therefore should be published with the Commission in tariffs, in compliance with Section 6 of the Act to Regulate Commerce and the appropriate tariff circulars of the Commission. (R. 137.) In accordance with this decision, the Yards Company withdrew its tariff in which it undertook to cancel its charges of 50 cents and 75 cents per car for unloading and loading live stock and continued to collect these charges. (Par. 33, Defts'. Ex. 1, R. 243, 237.)

Thereafter, upon petitions for rehearing filed by the Chicago Live Stock Exchange and the Yards Company, the Commission reopened its Dockets 1118 and 9977 and further hearings were held on May 20, 21 and 22, 1919, the transcript of evidence taken on these hearings being introduced as Defendants' Exhibit 7 (R. 269), and the exhibits offered thereon being introduced as Defendants' Exhibits 23 to 35, inclusive. (R. 276-282.) On this additional record, the Commission issued its further report under date of July 15, 1920, at 58 I. C. C. 164. (Pltfs'. Ex. 2, R. 141 *et seq.*)

In this report, the Commission reversed its previous finding that it was the duty of the shippers to load and unload stock at the Chicago yards, and held that this was a duty imposed upon the carriers under the law (R. 144); that since this service was a part of the transportation of live stock, the collection of separate charges therefor from the shippers in addition to the line-haul rates was an unlawful and unreasonable practice (R. 145), and that the shippers who paid and bore the charges for such loading and unloading, and who were parties of record to the case, had been damaged and were entitled to reparation with interest. (R. 146.)

With respect to the charges of the Yards Company, the Commission held that inasmuch as the obligation to load and unload live stock at the stockyards was in-

cluded in the transportation and no extra charge could be made for the service, it was not necessary to pass upon the reasonableness of the established charges of the Yards Company for that service; that it (the Commission) had jurisdiction over those charges and could consider their propriety at any time, upon complaint of any party. (R. 145.) It should be borne in mind that at the time of this decision, the increased charges of the Yards Company in the amount of 50 cents and 75 cents a car were in effect in a tariff on file with the Commission, pursuant to the requirements of the Commission's first report and had been collected since May 21, 1917, in accordance with that tariff.

In considering these two reports, a number of important facts should be borne in mind. One is that at no time had the propriety of the tariff charges of the Yards Company, as increased on May 21, 1917, been put in issue or questioned by any party. The Yards Company had attempted to cancel them as a matter of tariff publication, but was prevented from doing so by the Commission. Moreover, as appears from the first report of the Commission, the Chicago Live Stock Exchange did not, in its complaint filed in Docket 9977, attack the reasonableness or propriety of those charges. Nor did the Commission, in either report, hold them to be improper. On the contrary, in its second report, the Commission said it was not necessary to pass upon their reasonableness. Notwithstanding these facts, the Commission in its second report, recognized the right of the shippers to recover, as reparation, that portion of the increased charges of the Yards Company which had not been absorbed by the railroads.

Another fact is that in neither report was there any statement or finding that the line-haul rates of the Director General were unreasonable or otherwise unlaw-

ful. In fact those rates were not proven, either as to amount or application. Nor did the Commission require the Director General to absorb, out of those rates, the increased charges of the Yards Company, although this was the specific prayer of the complaint filed by the Chicago Live Stock Exchange. (Defts'. Ex. 2; R. 254, 255.)

Another fact to be kept in mind is that at the time of the Commission's second report, no shippers had as yet been named as parties complainant. The only complainant was the Chicago Live Stock Exchange, which was a corporation. Its complaint stated that it was filed on behalf of its members and patrons, but those members and patrons were not named and were not made complainants by the reference to them. The Chicago Live Stock Exchange did file with the Commission, in its Docket 9977, on June 16, 1919, a printed list described by the Commission in a subsequent report (Pltfs'. Ex. 3, R. 149), as,—

> "a printed list of farmers, stock raisers and shippers throughout the country who have made shipments to and from the Chicago market during the past two years and who have paid the charges under investigation in this proceeding."

This list was not introduced as an exhibit in the hearings before the Commission, was not served upon the defendants, and there is no evidence with respect to it. Nor was it filed as an amendment to the complaint. (R. 295.) In the first two reports of the Commission, the only reference to the shippers is the statement that reparation was due to those of them who had paid and borne the charges for loading and unloading and who were parties of record. Who they were does not appear in the complaint in Docket 9977, and the record made before the Commission up to this time did not show their intervention. They had offered no evidence. So

far as the record shows, they were only in the case as a result of the filing with the Commission, without notice to defendants and without testimony, of a document which purported to be a list of them.

Another fact to be noted in connection with the first two reports of the Commission is that nowhere does there appear any finding that petitioners are entitled to recover the reparation referred to by the Commission. These petitioners, commission men at the stockyards in Chicago, had not been named. So far as Docket 9977 is concerned, it never did appear, either in the record made before the Commission or otherwise, that petitioners had any interest whatsoever in the complaint filed. The complaint was never amended (R. 295) and while it states that the membership of the Chicago Live Stock Exchange is made up of commission men, it has never appeared that petitioners were or are those commission men.

A second complaint of the Chicago Live Stock Exchange was filed on February 25, 1921, and was docketed under the Commission's number 12614. (Defts'. Ex. 3, R. 257 *et seq.*) This complaint names the Director General of Railroads as agent, the Yards Company and a large number of line-haul railroads as defendants. It contains the same allegations as the complaint in Docket 9977, in so far as the Chicago Live Stock Exchange is concerned. It then alleges the taking over of the railroads of the United States by the Government, refers to the prior complaint in Docket 9977, and the prior reports of the Commission with respect to that complaint and the issues presented in Docket 1118. It differs from the complaint in Docket 9977 in that in paragraph 4 thereof it specifically names the then members of the Chicago Live Stock Exchange who are petitioners here, and alleges that with respect to shipments of live stock

to and from the Chicago Yards they acted either as consignees or consignors or as factors or agents for the shippers of inbound shipments and the consignors of outbound shipments.

The complaint further sets up that it is filed in order to secure reparation on shipments made since the date of the filing of the complaint in Docket 9977, and refers to an Appendix A attached thereto, which is alleged to be a list of the shippers of live stock to the Yards and of consignees of live stock shipped from the Yards and who, together with petitioners, paid and bore the 25 cents per car for loading and unloading, the collection of which was provided for by the tariffs of the Yards Company but which had not been absorbed by the line-haul carriers. The list of shippers, identified as Appendix "A" to this complaint was introduced in the trial court as Defendants' Exhibit 41. (R. 287.) In concluding, this complaint prayed that reparation on account of such payments as had been made, should be ordered by the Commission to be made either to the members of the Chicago Live Stock Exchange, as factors and agents, for the use and benefit of the shippers shown in Appendix "A", or directly to said shippers.

One hearing was held by the Commission in Docket 12614, on July 14, 1921, the transcript of the evidence then taken being introduced as Defendants' Exhibit 8. (R. 269.) One exhibit was offered on this hearing, it being introduced in the trial court as Defendants' Exhibit 36. (R. 282.) On April 8, 1922, the Commission entered an order (Defts'. Ex. 4, R. 267), reopening Docket 9977 and consolidating it with Docket 12614 for further hearing. Hearings in the two cases were then held by the Commission, the transcript of testimony taken on these hearings being introduced as Defendants' Exhibits 9 (R. 270), 10 (R. 270) and 11 (R. 271). The

exhibits offered on these hearings were introduced as Defendant's Exhibits 37, 38, 39, 40, 42, 43 and 44. (R. 283-289.)

Following these hearings, the Commission made its third report on June 2, 1925, at 100 I. C. C. 266. (Pltfs'. Ex. 3, R. 147, *et seq.*) In this report, reference is made to the filing with the Commission in Docket 9977, without service upon defendants, of the list of alleged shippers to which we have referred (R. 149), and which the Commission apparently had in mind when it referred, in its second report (R. 146) to shippers which it there said were entitled to reparation. After undertaking to state the issues presented in Dockets 9977 and 12614, the report then finds that the collection of separate charges from complainants and interveners for loading and unloading live stock at the Chicago Yards, during the periods mentioned, was an unlawful and unreasonable practice. (R. 150.)

With respect to petitioners, it is said that they sought reimbursement in their own names and right and also as factors and agents for the shippers. (R. 151.) It is then said that petitioners, who are named in the report, made the shipments and paid the charges found to have been unreasonable and unlawful, and reparation is awarded to them. (R. 151, *et seq.*) The record not being sufficient to determine the amount of reparation to which each petitioner was entitled, they were directed to prepare statements in accordance with Rule V of the Rules of Practice of the Commission, which statements were to be submitted to the defendants for verification, and if not so verified, were to be filed with the Commission for a check upon the record, with a view to the entry of an order awarding reparation. The Yards Company was also authorized to waive the collection of

any loading and unloading charges provided for by its tariffs and which had accrued but had not been collected. (R. 156.)

On December 12, 1927, without further hearing, the Commission entered the order herein sued on (Pltfs'. Ex. 4, R. 157, *et seq.*), in which it named the petitioners and prescribed the amount of reparation that should be paid to each by the defendants named. With respect to this order, it was stipulated that this action is to recover only those amounts which are preceded by the designation "U. S. Y. & T. Co. and D. G." for some railroad. The amounts not preceded by the initials "D. G." are not involved. (R. 209.) The order recites that the parties had filed agreed statements with respect to the shipments (R. 158), but this statement is in error and was subsequently corrected. The order concludes by requiring the defendants named to pay the amounts listed "to the complainants shown." It thus appears that the Commission's award was not to the shippers referred to in its second report, nor to petitioners as agents, factors or trustees for those shippers.

Thereafter, on May 14, 1928, the Commission issued a supplemental report in Dockets 9977 and 12614. (Pltfs'. Ex. 5, R. 210, *et seq.*) In this report it is stated that the Yards Company and the Director General had refused to verify the Rule V statements, and that because of this refusal the complainants had filed with the Commission tabulated statements and summaries which, after being checked with the record, were used as a basis for the order of December 12, 1927. (R. 211.) The statements and summaries thus referred to are not otherwise identified, and the only certain thing about them is that they were not served upon respondents nor offered as exhibits in any hearing before the Commission.

This report of the Commission also states that since the statements filed did not show the dates the charges were paid, the period as of which interest should commence should be fixed as being the first of the month following the date of the loading or unloading of the *stock.* (*R. 211, 212.*) This report was also accompanied by an order amending the order of December 12, 1927, by making the changes to which we have referred. On November 27, 1928, another order was entered (Pltfs'. Ex. 6, R. 214, 215) making still further changes in the names of certain members of the Chicago Live Stock Exchange, petitioners here.

This comprises all of the opinions and orders issued or made by the Commission in connection with the litigation. Upon the refusal of respondents to voluntarily pay the reparation awarded by the Commission in its order of December 12, 1927, this suit was started. The suit is based upon the order of December 12, 1927. (Pltfs'. Ex. 4, R. 157, *et seq.*) The prayer is for a judgment in favor of petitioners and against respondents for $140,001.25 with interest at 6 per cent, and a reasonable attorney's fee. The amount sued for is alleged to have been paid on shipments which moved between December 28, 1917, and March 1, 1920, which is the period of Federal control of railroads.

From the foregoing, it will be observed that while petitioners designate them as unlawful, at no time was there any attack upon the reasonableness or propriety of the charges of the Yards Company, and that the Commission never did hold them to be in any way unlawful. On the contrary, when it was sought to cancel the tariff containing those charges, the Commission entered an order requiring that that tariff be maintained on file with it, in accordance with what it conceived to be the

law. In its first report, it also said there was no attempt to prove the unreasonableness of the charges (R. 135) and in its second report said there was no necessity of passing upon the point. (R. 145.)

Nor was there ever any finding or order by the Commission that the line-haul rates of the Director-General were unreasonable or discriminatory. On the contrary, the action of the Director General in not absorbing all of the charges of the Yards Company was found not to be prejudicial (R. 139) and this finding was never reversed. As a matter of fact, the line-haul tariffs and rates of the Director General were never introduced in the record, and the amount of the rates does not appear.

It is said in petitioners' brief (p. 9) that the record shows the loading and unloading charges of the Yards Company also constituted payment for numerous services other than loading or unloading. This is incorrect. The tariff of the Yards Company containing its loading and unloading charges (p. 165, Certified Excerpts from Original Exhibits), shows on its face that the charges made therein covered no other service. The charges are stated thus:

> "For loading, 75 cents per car of any capacity.
> For unloading, 50 cents per car of any capacity."

The other services mentioned in petitioners' brief (p. 11) were performed by the Yards Company, but only as part of its general stockyards activities, and were not paid for by any part of the loading and unloading charges. These additional services and any compensation the Yards Company may have received for performing them are not here in issue.

It is also said in petitioners' brief (pp. 13, *et seq.*) that petitioners paid the charges herein sued for, which are erroneously dubbed "unlawful" charges. It is true

that petitioners physically paid the charges but that is all they did do. In some cases they charged the amount paid to the shippers, whose stock they had sold on a commission basis, deducting it from the proceeds of the sale before remitting the balance. In other cases they actually paid the charges out of the shipper's money, which they had received from the sale of his cattle before bills for the charges had been received. In no case did any petitioner actually suffer any damage as a result of the payment. If anyone suffered, it was the shipper, with whose money the charges were paid. All of these statements are proven on the record made before the Commission.

For example, Rosenbaum Bros. Co., a petitioner, claimed the reparation as agent for the shipper. (Defts'. Ex. 8, pp. 48, 49; certified to this court.) The representative of National Live Stock Commission Company, a petitioner, said the amounts paid by it had been charged to the shipper and that it had no claim on its own behalf. (Defts'. Ex. 9, pp. 62-64; certified to this court.) The representative of Brown, St. John Company, a petitioner, said his company collected all charges paid by it from the shipper, by deducting the amount of them from the proceeds of sales. (Defts'. Ex. 11, p. 953; certified to this court.) It was testified that Gillogly & Company and W. W. Wilson & Company, both petitioners, deducted all charges from the proceeds of sales before the principal received anything, and that the charges herein sued for were paid with the shipper's money, and not petitioner's. (Defts'. Ex. 9, pp. 277, 363, 364; certified to this court.) The foregoing is typical of a vast amount of testimony contained in the record before the Commission. No petitioner ever sustained any damage whatsoever as a result of the collection of the charges sued for.

The record is equally clear with respect to the status of petitioners in this suit. The award of reparation sued on is to them in their own names. (Pltfs'. Ex. 3; R. 152, *et seq.*) Their petition in the District Court alleges that they are entitled to the reparation awarded (see paragraphs 1, 2, 6, 22; R. 4, 11, 18) and no mention is made of their agency or factorship for anybody. Neither the award of reparation nor the suit were based upon assignments from the shippers to petitioners, nor upon powers of attorney (Defts'. Ex. 9, pp. 316, 317; R. 270; certified to this court) although it was indicated that the powers of attorney existed. (pp. 140, 153, certified excerpts from original exhibits.) The documents, however, were not produced or proven.

Nor did petitioners assume any obligation to pass any recovery on to the shippers who actually paid the charges sued for. During the hearings before the Commission, some of the witnesses for petitioners indicated that any recovery would be handed over to the shippers (Defts'. Ex. 8, pp. 36, 37; R. 269; Defts.' Ex. 9, p. 230; R. 270; both exhibits certified to this court), but the testimony did not amount to an assumption of liability, and counsel for petitioners took the position that his clients had a legal right to collect and retain the money and were under no obligation to say what they were going to do with it. (Defts'. Ex. 9, p. 236; R. 270; certified to this court.) It is thus obvious that petitioners are here attempting to enforce a payment to them in their own right, and not as agents or factors for the shipper. Their claim necessarily is that this was the award of the Commission.

Under these circumstances, the claimed agency or factorship of petitioners (pp. 13 *et seq.* of petitioners' brief) is of little importance. The facts upon which it is based,

however, are clearly shown of record. When stock was received by the commission men, petitioners here, it was sold, all charges deducted from the proceeds and the balance remitted to the shipper. Petitioners also sometimes handled claims for damage and involving the charges on such shipments. In some instances shippers had open accounts with petitioners, but in most cases, the accounts on each shipment were closed when the balance after charges was remitted to the shipper. (pp. 90, 91, certified excerpts from original exhibits.)

SUMMARY OF ARGUMENT.

I.

The order of the Commission awarding the reparation herein sued for is *prima facie* evidence of the facts therein stated, but is not a finality. It establishes only a rebuttable presumption or rule of evidence. It is still open to respondents to interpose any defense which demonstrates the impropriety of the order or the inability of petitioners to recover thereon.

II.

In both the District Court and the Circuit Court of Appeals the Yards Company urged numerous defenses to this action. Each and every of those defenses was good in law and justified a judgment in favor of said respondent. The judgment of the District Court was based upon only one of those defenses and the judgment of the Circuit Court of Appeals was also based upon only one of those defenses, although a different one from that sustained by the District Court. The complaint of petitioners is against the judgment and not the reasoning upon which it is based. That judgment will be sustained if justified by any of the defenses urged.

III.

In the proceedings before the Commission the Yards Company contended that it was not a common carrier and was not performing a common-carrier service in loading and unloading live stock. The Commission overruled this defense. It held that the Yards Company was performing a common-carrier service in loading and un-

loading live stock, and that the law required it to maintain its charges for that service in tariffs on file with the Commission. In conformity with this ruling, the Yards Company so maintained on file with the Commission during the entire reparation period, its tariffs stating its charges for the service of loading or unloading live stock. It was, therefore, obliged under the law to collect and retain those charges and the Commission had no authority or jurisdiction to require the repayment of any part of them to any party in the absence of a finding, based upon sufficient evidence, that those charges were unreasonable or otherwise unlawful. There was no such finding and no evidence in the record upon which such a finding could have been properly based. The order sued on herein was, therefore, beyond the jurisdiction of the Commission and is invalid.

IV.

The duty to load and unload live stock at the stock yards in Chicago was an obligation of the shipper or consignee and should have been sustained by them through the payment by them of the charges of the Yards Company, assessed by it for its performance of the service. It follows, therefore, that since the shipper has only paid for this service a charge which the law obliged him to pay, the order of the Commission is invalid and there can be no recovery thereon. Even if the duty to load and unload such live stock rested upon the line-haul carriers or the Director General, as held by the Commission, there can still be no recovery in this case from the Yards Company. Such a holding, if proper, would have required the payment of the charges of the Yards Company by the line-haul carriers or the Director General. The Yards Company, therefore, has only received an

amount which had to be paid either by the shipper, the consignee or the Director General and there can be no recovery from it.

V.

Claims for reparation before the Commission and suits in court must be brought in the names of the real parties in interest. This suit is brought in the names and right of petitioners, and not by them for or on behalf of any other party. Petitioners are not the real parties in interest, either in fact or in law. They did not pay or bear the charges sued for herein and were not damaged within the meaning of the Act to Regulate Commerce. Since, therefore, they have brought this suit in their own names and right, there can be no recovery herein. Nor can there be any recovery by petitioners in the character of factors and agents for the shippers. This suit is not brought by petitioners in that capacity and could not be so brought, since the award of reparation by the Commission was not to petitioners as factors and agents. And in any event, the factorship or agency had terminated prior to the bringing of the action and no suit could have been maintained by petitioners in that capacity.

VI.

This suit is to recover reparation on shipments moving only during the period of federal control. The Yards Company never was under federal control. Notwithstanding, the Commission has awarded reparation in the order sued on herein against the Yards Company with respect to shipments which moved intrastate within the State of Illinois. It had no jurisdiction to make such an award. The record does not contain evidence sufficient to enable the court to distinguish between that

part of the reparation sued for which is alleged to be due upon interstate shipments and that part which is alleged to be due upon intrastate shipments. The Yards Company having rebutted the presumption of validity which attaches to the reparation order by showing its invalidity to some extent, the burden was upon petitioners to show the extent to which it was valid. They have failed to do this and there can be no recovery herein.

VII.

The award of reparation made by the Commission herein was made in two separate proceedings before it. In one of those proceedings, the record fails to show that petitioners were parties complainant and also fails to show how much reparation was awarded in each of the two proceedings. The order sued on is invalid in so far as it awards reparation in that proceeding in which the record fails to show that petitioners were complainants, and since there is no proof as to how much of the total award is thus invalid, there can be no recovery at all.

VIII.

The only evidence before the Commission and upon which it could determine the amount of the reparation awarded by it in the order sued on herein, was not admissible in evidence, as it was secondary, hearsay, and based upon records which were neither identified, produced or proven. The objections of the Yards Company to the receipt of this evidence in the record in the proceedings before the Commission should have been sustained. Had they been sustained, the record before the Commission would have contained no evidence showing any amount or amounts due to petitioners. The receipt of such evidence prejudiced the rights of the Yards

Company, denied it a fair hearing and amounted to a denial of due process. The order sued on is, therefore, invalid and there can be no recovery thereon.

IX.

It appears from the various orders entered by the Commission in the course of the proceedings before it that the reparation order sued on herein was made by it after a consideration of evidence which was not introduced in the record before the Commission upon any hearing, was not submitted to the respondents and with respect to which respondents were denied the right of cross-examination. In the absence of such evidence, the record before the Commission would have been insufficient to justify any award of reparation. The reparation order sued on is, therefore, invalid and there can be no recovery thereon.

ARGUMENT.

I.

THE ORDER OF THE COMMISSION SUED ON IN THIS CASE WILL NOT BE SUSTAINED AND IS INVALID UNLESS IT IS SUPPORTED BY EVIDENCE AND IS NOT CONTRARY TO LAW. THE PRIMA FACIE EFFECT OF THE ORDER SUED ON MAY BE REBUTTED, EITHER BY THE EVIDENCE SUBMITTED TO THE COMMISSION OR BY EVIDENCE SUBMITTED IN COURT.

Throughout petitioners' brief there is an intimation that neither the District Court nor the Circuit Court of Appeals have had sufficient deference for the various opinions and orders of the Commission. The fact that the Commission has made an order in this case does not mean that the proceedings in the trial court should have differed in any way from the accepted methods of trying any other suit therein, or that the trial judge should have adopted a different attitude toward petitioners than toward other litigants. There is nothing in the Act to Regulate Commerce or in any decision which justifies such a contention.

In the proceedings before the Commission, petitioners received the full benefit of the loose practice before that body, and in the District Court and Circuit Court of Appeals they received the full benefit of any presumptions of validity which attached to the order sued on. Notwithstanding the presumption of validity which attached to that order, it was, nevertheless, open to respondents to contest the propriety of the order, either by maintaining that the evidence before the Commission did not justify it, or that the Commission exceeded its power in making it.

Under Section 16 (2) of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 16 to end p. 16), an order of the Commission in such a suit as this is *prima facie* evidence of the facts therein found, but this is the furthest extent to which the statute goes. This provision of the law establishes a rule of evidence only. It provides that suits such as this one

> "shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated * * *."

It thus appears that under the express provisions of the law this suit should have been tried in the lower courts in precisely the same fashion as any other suit to recover damages. The order of the Commission having been given its *prima facie* effect, petitioners were in the same position as any other plaintiffs seeking a recovery and were subject to the same obligations. The precise rights of plaintiffs and defendants in such an action as this have been passed upon repeatedly by the courts. In speaking of the effect of that part of Section 16 which makes the orders of the Commission *prima facie* evidence of the facts therein stated, this court in *Meeker* v. *Lehigh Valley Railway Company*, 236 U. S. 412, said at page 430:

> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence."

To the same effect are the decisions in *Williamette, etc. Co.* v. *Baltimore & Ohio R. Co.* 29 Fed. (2d) 80, 82, and *Krauss Bros.* v. *Mellon, etc.* 18 Fed. (2d) 369, 370. In this case, the Yards Company has urged, in support of the decisions of the lower courts, only those arguments

which, if correct, constitute a complete defense to this action.

II.

THE APPEAL HEREIN IS FROM THE JUDGMENT OF THE LOWER COURT AND NOT FROM ITS OPINION. THE JUDGMENT WILL NOT, THEREFORE, BE REVERSED, IF IT MAY BE SUSTAINED ON THE GROUND MENTIONED IN THE OPINION OF THE CIRCUIT COURT OF APPEALS OR FOR ANY OTHER REASON.

The motion for a directed verdict, made by the Yards Company in the trial court, was based upon a number of grounds. All were urged with equal force and with the belief that each of them was good and constituted a complete defense to petitioners' claim. Only one of these grounds was referred to by the District Court in its opinion, the court's statement with respect thereto being as follows (R. 66):

> "The defendants in their motion for a directed verdict raise many contentions which are common to both defendants and many other contentions which apply separately to the defendants on whose behalf they are made. In the view the court takes of this case it is unnecessary to summarize these various contentions or to discuss them *seriatim*."

This conclusion of the District Court was reached because in its opinion it was necessary to do no more than to pass upon the first point which had been raised. In the second opinion of the District Court, filed in the motion for leave to amend, it is said (R. 118):

> "The appeal is from the judgment of the court and not from its opinion. The court may have assigned a wrong reason for the judgment. While the court in its opinion did not advert to the other points argued by the defendants, yet it seems to the court that on other grounds, not referred to in the

opinion, the judgment of the court may be maintained."

In the Circuit Court of Appeals the same situation existed. The same defenses were urged by both respondents as in the trial court. That court also, found it necessary to consider only one of the defenses urged; one different from that upon which the judgment in the District Court was based. In cannot be doubted that if the judgments of the District Court and the Circuit Court of Appeals were right, for any of the reasons urged by respondents, those judgments should be affirmed in this court.

In *Dinsmore* v. *Southern Express Company*, 183 U. S. 115, this court said at page 121:

> "As the order of the Circuit Court of Appeals directing the dismissal of the suit accomplishes a result that is appropriate in view of the act of 1901, we need not consider the grounds upon which the court proceeded, or any of the questions determined by it or by the Circuit Court, and the judgment must be affirmed."

On this point, see also *Camp* v. *Gress*, 250 U. S. 308, 317; *Y. & M. V. R. Co.* v. *Mullins*, 249 U. S. 531, 532; *United States* v. *Heinrich*, 16 Fed. (2d), 112, 113; *Lewis-Hall Iron Works* v. *Blair*, 23 Fed. (2d), 972, 974; *City of Newark* v. *Mills*, 35 Fed. (2d), 110, 111; *Clinton, etc., Co.* v. *Cochran*, 247 Fed. 449, 450; *Brace* v. *Construction Co.*, 36 Fed. (2d), 661, 663. We insist that the decisions of the District Court and Circuit Court of Appeals were correct on the grounds assigned in the opinions of those courts, but we call attention to this situation at this time, because we will argue to this court the propriety of the judgment herein, not only on the grounds assigned in the opinions of the lower courts but upon each and every of the grounds argued by us in both those courts.

III.

UNDER THE THEORY OF THE LAW ADOPTED BY THE COMMISSION, THE YARDS COMPANY WAS OBLIGATED TO FILE WITH THE COMMISSION ITS TARIFF CONTAINING ITS CHARGES FOR LOADING AND UNLOADING LIVE STOCK. IF THIS WAS SO, THE LAW REQUIRED THE YARDS COMPANY TO ASSESS, COLLECT AND RETAIN THOSE CHARGES. THE REASONABLENESS AND PROPRIETY OF THOSE CHARGES WAS NOT IN ISSUE IN ANY PROCEEDING BEFORE THE COMMISSION, AND THEY HAVE NEVER BEEN CONDEMNED BY THE COMMISSION. NOTWITHSTANDING THIS, THE ORDER SUED ON HEREIN OPERATED TO REDUCE THOSE CHARGES AND IS, THEREFORE, UNLAWFUL AND VOID.

The Yards Company consistently maintained in the proceedings before the Commission that it was not a common carrier, the claim being that because of changes in the conditions which existed in 1913, the decision of this court in *United States* v. *U. S. Y. & T. Co.* 226 U. S. 286, was no longer controlling. If this was so, the Commission did not have the jurisdiction which it exercised, and the order sued on is necessarily bad. The Commission, however, overruled this claim, and the order sued on was made on the theory that the Yards Company was performing a common-carrier service in loading and unloading live stock.

Pursuant to this theory, the Commission in its Investigation and Suspension Docket 1118, declined to permit the Yards Company to discontinue the publication of its tariff containing its increased charges of 50 cents and 75 cents for unloading and loading livestock, and affirmatively required the Yards Company to continue the filing with it of that tariff. This requirement was based upon the holding that as a common carrier, the

Yards Company was required, under Section 6 of the Act to Regulate Commerce, to publish and file its tariffs in conformity with the requirements of that section of the law. (Pltfs'. Ex. 1, R. 137.)

Therefore, during the entire reparation period covered by the petition herein, the Yards Company was obligated, under the Commission's decision, to collect its charges of 50 cents per car for unloading and 75 cents per car for loading live stock. Its failure to make this collection would have been a departure from the requirements of its tariff. Those charges of the Yards Company were published in its own tariffs. (Par. 1, Defts'. Ex. 1, R. 243, 233.) The railroads were never parties to those tariffs of the Yards Company (Pars. 5 and 6, Defts'. Ex. 1, R. 243, 233, 234), and the Yards Company was never a party to the rates or tariffs of the railroad. (Par. 26, Defts'. Ex. 1, R. 243, 235, 236.)

Assuming for the purpose of this argument, but without conceding, that during this period the Yards Company was performing a common-carrier service in loading and unloading live stock, the order sued on was also bad. Neither in Docket 9977 or in Docket 12614 before the Commission was there any claim that the charges of the Yards Company were unreasonable or otherwise improper. In Docket 9977, as stated by the Commission in its first report (Plfts'. Ex. 1, R. 135), the issue of the reasonableness of the charges of the Yards Company was not raised, and the failure of the railroads to absorb all of those charges was not found to be prejudicial.

In its second report (Plfts'. Ex. 2, R. 145), the Commission also stated that it was unnecessary to pass upon the reasonableness of the separately established charges of the Yards Company for loading and unloading, pre-

sumably because the Commission thought these charges would be absorbed by the railroads. Nor was there ever any condemnation of the charges of the Yards Company in any subsequent report of the Commission. In the report dated July 15, 1920 (Plfts'. Ex. 2, R. 141), the finding of the Commission was (R. 145):

> "That the collection of separate charges from the shippers for unloading or loading in addition to the rates on live stock * * * was an unreasonable and unlawful practice."

In the report of June 2, 1925 (Plfts'. Ex. 3, R. 147) precisely the same finding was made. This language is not a condemnation of the charges of the Yards Company, and indeed there could be no such condemnation, or the Commission had just finished finding that the legal obligation of the Yards Company was to maintain those charges on file with it in tariff form.

The same situation exists with respect to the Director General. As we have said, the first complaint of the Chicago Live Stock Exchange asked that the line-haul carriers be required to absorb the increased charges of the Yards Company, it being alleged that with the 25 cent increase in the Yards Company charges added to the line-haul rates, those rates were unreasonable. (R. 254-256.) The failure of the line-haul carriers to absorb those charges was also said to be discriminatory and prejudicial. (R. 256.) Substantially the same allegations were made in the second complaint. (R. 266.) The Commission held, however, that the failure of the line-haul carriers to absorb the increased charges of the Yards Company was not prejudicial (R. 139), and never reversed this finding. Moreover, it never held that the line-haul rates, plus the increase in the charges of the Yards Company, amounting to 25 cents a car, were unreasonable or otherwise unlawful and never made any

requirement that the Director General absorb the increased charges.

The reasonableness of the Yards Company charges and the line-haul rates of the Director General was never a real issue in the case. This is conceded in the brief filed herein by the Commission as *amicus curiae* (p. 6, Commission's brief). Because of this, and the failure of the Commission to find anything wrong with them, it must be considered that those rates and charges were reasonable. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 478, 479.

Notwithstanding these facts, the Commission's order either required the Director General to reduce his line-haul charges by the amount of the increase in the charges of the Yards Company, or required the Yards Company to refund one-half of the unloading charges collected by it and one-third of the unloading charges collected by it during the reparation period. Under the circumstances, such a requirement was plainly unlawful, and was properly so held by the Circuit Court of Appeals.

In holding that the Yards Company, as a common carrier, was under a legal obligation to file its tariffs containing its loading and unloading charges with it, the Commission, in its report of February 11, 1919 (Plfts'. Ex. 1, R. 121) referred to the requirements of Section 6 of the Act to Regulate Commerce. (R. 139.) This section of the law, in paragraph 1 thereof (U. S. C. A., Title 49, Sec. 1 to 15a, pp. 240, 241), provides in part as follows:

> "Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter, and print and keep open to public inspection, schedules showing all the rates, fares and charges for transportation between differ-

ent points on its own route and points on the route of any other carrier by railroad * * *."

This language has been construed as imposing a positive duty on common carriers subject thereto, with respect to the filing of tariffs, and was so construed in the litigation which led up to the holding of this court that the Yards Company was a common carrier. *United States* v. *Union Stock Yard & Transit Company*, 192 Fed. 330, 226 U. S. 286.

In this case the Commission held that since the Yards Company was a common carrier, the provisions of Section 6 of the act required it to maintain its published tariffs on file with the Commission, and in accordance with this conclusion, the Yards Company did so maintain its tariffs during the entire reparation period covered by the order of the Commission sued on herein. If the Yards Company was a common carrier, the law required it to collect and retain the entire amount of its loading and unloading charges. In *Pennsylvania Railroad Company* v. *International Coal Co.*, 230 U. S. 184, this court said at page 196, referring to the collection of rates contained in tariffs:

> "When collected, it was unlawful under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, Sec. 2; March 2, 1889, 25 Stat. 855, c. 382, Sec. 6. *Armour Co.* v. *United States*, 209 U. S. 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless

bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

The same holding was made in *Armour & Co.* v. *United States*, 209 U. S. 56, 72, and *Davis* v. *Portland Seed Co.*, 264 U. S. 403, 418, 425. And what we have said also applies to the Director-General. At no time did the Commission ever find that the line-haul rates maintained by him were unreasonable or otherwise unlawful. He was under the same obligation to collect and retain the full amount of those rates. Yet the order of the Commission, if a payment is made thereunder, will require a reduction, either in the charges of the Yards Company or those of the Director-General.

We concede the primary exclusive jurisdiction of the Commission to pass upon the legality of rates charged by a common carrier. *Great Northern R. Co.* v. *Merchants Elevator Co.* 259 U. S. 285, 291; *A. T. & S. F. Ry.* v. *United States*, 232 U. S. 199, 220; *Northern Pacific R. Co.* v. *Solum*, 247 U. S. 477. We also concede that the decision of the Commission on such a question will not be disturbed by the courts if made after proper hearing, supported by evidence, within constitutional limits and not unreasonable or an abuse of power. *Manufacturers Ry. Co.* v. *United States, supra; Assigned Car Cases*, 274 U. S. 564, 580, 581; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663; *Western Chemical Co.* v. *United States*, 271 U. S. 268, 271; *Chicago Junction Case*, 264 U. S. 258. It follows that in this case the Commission might have found, had the record been sufficient, that the increased charges of the Yards Company were unreasonable; or that the addition of the increase to the line-haul rates made those rates unreasonable; or that the failure of the Director-General to absorb the increase resulted in prejudice or discrimination. As a

corollary to this right, it might have required the payment of reparation.

The fact is, however, that it did none of these things. It even held that the reasonableness of the Yards Company charges was not in issue and that the failure of the line-haul carriers or the Director General to absorb those charges was not prejudicial. A finding of illegality in the charges of the Yards Company or of the Director General was a prerequisite to the Commission's order that any part of those charges should be refunded to petitioners. *Pennsylvania R. Co.* v. *International Coal Co., supra; Baltimore & Ohio R. Co.* v. *United States,* 277 U. S. 291, 301, 302; *Florida East Coast R. Co.* v. *United States,* 234 U. S. 167. Without such a finding, the payment could not be validly required.

The Commission sought to cloak its action by a finding that the "practice" of collecting the charges was illegal. But this does not help petitioners. The Commission having failed to find any illegality in the charges of the Yards Company, or in the line-haul rates of the Director General, the law required the collection which was made. No "practice" by which those charges were collected could have been illegal. On the contrary, a failure to collect them would have been illegal.

We concede the right of the Commission, urged in its brief (p. 5) to condemn an unreasonable practice under Section 1 (6) of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 1 to 15a, p. 79) and Section 10 of the Federal Control Act. But the condemnation must be based upon an adequate record. In *Baltimore & Ohio R. Co.* v. *United States,* 277 U. S. 291, the Commission undertook to condemn a "practice" but its action was set aside because the record did not contain evidence supporting the action taken. So in this case. The only

effect of the order made, if complied with, would be to reduce respondents' tariff charges. This cannot be done through indirection, but must result from a definite finding that those charges are unlawful. There is no such finding, nor would the record have supported one, if made. It follows that the practice of collecting those lawful charges could not have been unlawful.

From the standpoint of the Yards Company, precisely the same situation was presented in *Interstate Commerce Commission* v. *Stickney, et al.*, 215 U. S. 98. That case involved the propriety of the $2 terminal charge assessed by the Yards Company for the use by the railroads of the railroad that the Yards Company then owned, and which charge had been added by the railroad to their line-haul charges on live stock. The matter had been submitted to the Commission and in the proceedings before it, the propriety of the $2 charge had been demonstrated. Notwithstanding this proof, the Commission entered an order requiring the railroad companies to reduce the charge against the shipper to $1, which presumably would have required a decrease in the amount of the charge assessed by the Yards Company for the use of its track. This being the situation, this court held at page 109:

> "Under those circumstances it seems impossible to avoid the conclusion that, considered of and by itself, the terminal charge of two dollars a car was reasonable. If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards is would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced the Union Stock Yards Company will suffer loss while the real wrongdoers will escape. It may be that it is more convenient for the

commission to strike at the terminal charge, but the convenience of commission or court is not the measure of justice."

The decision in *Interstate Commerce Commission* v. *C. B. & Q. R. Co.*, 186 U. S., 320, is also in point. That case also involved the terminal charge of $2. When the matter was presented to the Commission, that body had held, in effect, that considered alone, both the terminal charge and the line-haul rate were reasonable. Notwithstanding this failure to find the rates unreasonable, the Commission ordered the terminal charge to be reduced. In passing on the propriety of the order, this court said at page 339:

"In other words, two absolutely conflicting propositions cannot at the same time be adopted. As the finding was that both the terminal charge of $2 and the through rate as reduced when separately considered were just and reasonable, and as the further finding was that as a consequence of the reduction of from $10 to $15 per car, the rates, considered together, were just and reasonable, it follows that there can be no possible view of the case by which the conclusion that the rates were unjust and unreasonable can be sustained."

The situation in the case at bar is the same as that in the cases cited. No part of the record before the Commission shows that the charges of the Yards Company, or of the Director General, were unreasonable. It is conceded that this was not an issue before the Commission. The Commission having failed to find the charges of either respondent illegal, its action in this case must be condemned just as its similar action was condemned in the *Stickney Case* and the *C. B. & Q. Co. Case, supra.* If either respondent is required to make a refund as a result of any judgment herein, it will be put in the position under the Commission's order of being required to render a common carrier service for a

lesser amount than the law authorized and required it to collect. Even the Commission cannot compel such a result. The language used in *Knudson, etc. Co.* v. *Michigan Central R. Co.*, 148 Fed. 968, is appropriate to this case. The court said at page 974:

> "The record before us discloses no finding and rulings of the Commission against the reasonableness of the rates and there was no proof upon the subject. There was no proof that what the plaintiff actually paid was in excess of a reasonable compensation for the services performed, whether considered separately or in the aggregate; nor does it appear that any discrimination of any kind or character was practiced against it. In the absence of a showing of injury or damage there can be no recovery."

It is obvious from the various reports of the Commission, that what that body was trying to do in this case was to require the absorption of the charges of the Yards Company by the line-haul carriers. This was the specific relief asked for in the complaint filed in Docket 9977, and was the issue dealt with in the Commission's first report. (Pltfs'. Ex. 1, R. 121, *et seq.*) That action by the line-haul carriers would also have been a complete compliance with the finding of the Commission that the collection of the Yards Company charges from the shippers, in addition to the rates for transportation, was "an unlawful and unreasonable practice." Under such a disposition of the case, the Yards Company would have been permitted and required to collect and retain its charges, in accordance with the Commission's decision with respect to those charges, but the shippers would not have been required to pay any part of them.

This conclusion is strengthened by the fact that on February 29, 1920, there became effective Section 15 (5) of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 1 to 15a, p. 426) which required the payment of the

entire charge of the Yards Company by the line-haul carriers, a circumstance referred to by the Commission in its report of July 15, 1920. (Pltfs'. Ex. 2, R. 143.) Certainly, an order requiring the line-haul carriers to absorb the charges of the Yards Company could not have been sustained on the record made in this case, which, perhaps, is the reason such a requirement was not made, but it is only on this theory that there can be any reconciliation of the various conclusions reached by the Commission.

What we have said is a complete answer to the arguments advanced by petitioners in the major portion of their brief. Those arguments are almost entirely based upon a misunderstanding of the evidence and of what the Commission actually did. We may refer to them briefly.

(1) *The Character of the Charge Collected.*

Throughout petitioners' brief, the increased charges of the Yards Company, collected from the shippers, are designated as "unlawful" or "illegal" charges. Those charges were neither unlawful or illegal, unless the assertion of counsel makes them so. Certainly, they were never held to be so by the Commission, which, as petitioners are at pains to point out, had exclusive primary jurisdiction over them if the Yards Company was a common carrier. Petitioners are forced to assume the unlawfulness of the charges collected for as we have said, no "practice" by which legal charges were collected could possibly be unreasonable or unlawful. And then, in the face of this assumption, they say at page 26 of their brief that the reasonableness of these charges is immaterial.

At pages 23 and 24 of their brief, petitioners devote

some space to the claim that they have never admitted the increased charges of the Yards Company to be reasonable or lawful. Such an admission by them is not necessary. Those charges were contained in a tariff filed with the Commission, and must be held to be reasonable and lawful in the absence of a finding by the Commission that they are not so. And there is no such finding.

(2) *The Alleged Wrong Complained of by Petitioners.*

At pages 26 and 27 of petitioners' brief, the wrong said to have been committed by the Yards Company was its alleged action in conniving with the Director General to collect the charges sued for herein from the shipper, when it had knowledge of the shipper's right to a completed transportation service, including unloading, without such payment. It is said (p. 27):

> "'The gist of the wrong done was the violation of the shipper's right growing out of the published tariffs of the line-haul carriers with whom he had contracted.''

The position here taken by petitioners is based upon a misunderstanding. During the entire reparation period here in issue, the tariffs of the Director General only provided that he would absorb 50 cents and 25 cents a car for the loading or unloading of stock at the stockyards in Chicago. They contained no undertaking with respect to the payment by him of any additional amounts. Petitioners fall into the error of assuming (p. 22, petitioners' brief) that because the line-haul carriers did absorb all of the loading and unloading charges of the Yards Company at one time, they or the Director General assumed a continuing obligation to absorb them at all times, regardless of their amount. The tariffs of the line-haul carriers, however, never contained any such un-

dertaking and the Commission did not hold that the line-haul tariffs should have contained it.

Notwithstanding the argument of petitioners (pp. 51-59, petitioners' brief) the Circuit Court of Appeals was right in holding that respondents' obligations were fixed by their tariffs. Anybody who could read could understand the tariffs. That of the Yards Company fixed its charges at 75 cents per car for unloading and 50 cents per car for unloading (p. 165, certified excerpts from original exhibits). That of the Director General said that he would pay 50 cents per car for loading and 25 cents per car for unloading (p. 169, certified excerpts from original exhibits). No question of tariff construction was involved.

The tariffs constituted notice to the world that during the reparation period, the shipper would be required to pay 25 cents per car for the loading or unloading of his stock, this being the difference between the total amount of the Yards Company charge and the absorption by the Director General. *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94, 98; *Keogh* v. *C. & N. W. R. Co.*, 260 U. S. 156, 163; *Louisville & Nashville R. Co.* v. *Central Iron Works*, 265 U. S. 59, 65. And the absorption provision in the tariffs of the Director General definitely fixed his obligations. (Section 7, par. (6) and (7); U. S. C. A. Title 49, Sec. 1 to 15a, pp. 282, 283). On this point the Commission also held (R. 137) that all absorptions by a line-haul carrier must be specified in its tariffs.

It follows that at no time during the reparation period did the shippers or anyone else have a right to the transportation of live stock to Chicago, including the unloading thereof, upon payment of the line-haul charge for transportation. At all times, the tariffs of the Yards

Company and the Director General provided for an additional payment of 25 cents per car for loading or unloading. Consequently, there could have been nothing unlawful in the collection of this amount from the shipper, no matter how it was actually done.

(3) *The Alleged Agency of the Yards Company.*

Petitioners contend that the Yards Company was the agent of the Director General in performing the loading and unloading service and on that ground claim that its charges were not lawful, in so far as they were collected from the shippers, although conceding that they were legally established. (pp. 59-74, petitioners' brief.) This is a contradiction in terms.

The Yards Company did contend before the Commission that in performing the loading and unloading service, it was acting as the agent of the line-haul carriers. This position was taken by it in an effort to support its claim, then being made, that it was not a common carrier. The Commission itself referred to this contention in its first decision. (Pltfs'. Ex. 1, R. 137.) The Commission, however, overruled this contention and held the Yards Company to be a common carrier and required it to publish its own tariff containing its charges for the loading and unloading service.

Under this holding, the charges constituted a legal charge against the shipments and the initial obligation to pay them rested upon the same parties who were obliged by law to pay the line-haul charge. The charges of any common carrier contained in its tariffs filed with the Commission as required by law must constitute a charge against the shipment and be payable by those parties upon whom the law imposes an obligation to pay. *N. Y. C. R. Co.* v. *York & Whitney Co.*, 256 U. S.

406, 408; *Pennsylvania R. Co.* v. *International Coal Co. supra; Keogh* v. *C. & N. W. R. Co., supra; L. & N. R. Co.* v. *Central Iron Works, supra.* If this is not so, any common carrier might restrict the application of its tariffs so as to impose the obligation to pay upon only one party to a shipment, thus relieving other parties to the transportation from the obligation to pay imposed upon them by law and perhaps relieving the carrier itself from its legal obligation to collect the charges.

Thus, if the Yards Company was a common carrier, and that was the theory of the Commission's order, the primary obligation to pay its charges rested upon the shipper. That obligation was reduced by the absorption of part of the charges by the Director General, but remained effective as to the unabsorbed balance. The Commission never held that the entire loading and unloading charges of the Yards Company should be paid by the Director General, on the theory of agency. The idea is that of petitioners.

(4) *The Alleged Determination by the Circuit Court of Appeals of the Reasonableness of the Yards Company Charges.*

At pages 74 and 75 of their brief, petitioners say the Circuit Court of Appeals erred in passing on the reasonableness of the Yards Company charges. The fact is that the court did not do so. It only said (R. 397) that it knew that the cost of the service rendered by the Yards Company had increased materially at the time the Government took over the railroads, and (R. 398) that this increased cost justified increased charges. There was no necessity for the court to pass on the propriety of the increased charges made by the Yards Company and it did not do so. Those charges were in effect at

all times during the reparation period. No one had said they were too high, and the Commission had said their reasonableness was not an issue in the case. Under these circumstances, the court would have been fully justified in holding them reasonable had it seen fit to do so.

(5) *The Absorption of the Yards Company Charges by the Director General.*

We refer to this matter to illustrate the lengths to which petitioners are impelled by their own arguments. At page 25 of their brief, petitioners insist that this case does not involve the absorption by the Director General of the charges of the Yards Company. They are compelled to assume this position because of the Commission's failure to require such an absorption. Yet they argue (pp. 30 to 51, petitioners' brief) that the obligation to pay for the loading and unloading of live stock at the Chicago stockyards rested upon the Director General, which, if true, would require him to absorb the charges of the Yards Company. They also say (p. 27, petitioners' brief) that they were entitled to the transportation of live stock, including unloading, upon payment of the line-haul charges, which necessarily means that the Director General would be required to absorb the increased charges of the Yards Company.

The only other alternative would be the failure of the Yards Company to collect its charges, and on this point, petitioners admit (pp. 71, 72, petitioners' brief) that they were legal charges, and that a common carrier, such as the Yards Company was held to be, is compelled to collect its tariff charges under penalty of law. True, petitioners also say that the Yards Company should have collected its charges from the Director General, but such a collection would have required the absorption

by the Director General of the amount so collected from him, and petitioners insist that such an absorption was not an issue in the case. To such a pass does the reasoning of petitioners lead.

Petitioners say that the reasonableness of the charges of the Yards Company and the Director General was not involved in the case before the Commission. (pp. 26, 73, petitioners' brief.) Admitting that these charges were contained in tariffs, they concede the obligation of both respondents to collect them. (pp. 71, 72, petitioners' brief.) Conceding that the Commission did not find any of these charges unreasonable, they cite *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co.* 52 Sup. Ct. Rep. 183, to prove that in the absence of such a finding, the charges had to be paid, and having been paid could not be recovered.

Having thus demonstrated the completeness of respondents' defense herein, they say that the Director General should have been required to pay the charges of the Yards Company, and in the same breath say that his absorption of those charges is not involved in the case. Such arguments only serve to demonstrate the correctness of the opinion of the Circuit Court of Appeals.

Petitioners have in fact argued themselves out of court. At pages 21 and 22 of their brief, they say, after conceding the right of a carrier to separately publish its terminal charges:

> "Nor is there any doubt as to the law that such terminal charges, if reasonable in themselves, and in connection with other transportation rates produce a reasonable aggregate for the performance of the entire transportation service, are proper and will be sustained."

As we have said, the charges of the Yards Company

and the line-haul rates of the Director General must be held to be reasonable, since their reasonableness was not in issue and they were not held by the Commission to be unreasonable or otherwise unlawful. The sum of them, less the part of the Yards Company charges which was absorbed by the Director General, necessarily produced, therefore, a reasonable aggregate charge for the entire service, including unloading. It results, to use the words of petitioners' brief, that the charges "are proper and will be sustained." This court so held in a substantially similar case. *Interstate Commerce Commission* v. *C. B. & Q. R. Co. supra.*

IV.

THE DUTY TO LOAD AND UNLOAD LIVE STOCK AT THE STOCKYARDS WAS AN OBLIGATION OF THE SHIPPER OR CONSIGNEE. THE COMMISSION'S FINDING TO THE CONTRARY WAS NOT SUPPORTED BY THE EVIDENCE AND IS CONTRARY TO LAW.

At pages 30 to 51 of their brief herein, petitioners argue that the obligation to load and unload live stock at the Chicago stockyards rested upon the line-haul carriers or the Director General. The position of the Yards Company on this matter may be briefly stated. It maintained before the Commission that it was not performing a common-carrier transportation service when it loaded or unloaded live stock at the Chicago stockyards. Had the Commission sustained this contention, the reparation order herein sued on could not have been entered against the Yards Company. It would have been beyond the Commission's jurisdiction. The Commission held, however, that the Yards Company was performing a common-carrier service in loading and unloading the live stock (R. 138, 144), but that the obligation to pay for the service rested upon the line-haul carriers. (R.

144.) Under these findings, the reparation order is still void as to the Yards Company, since the Commission never held that it was not entitled to receive its tariff charges for the loading and unloading service performed by it.

The issue as to who should have loaded and unloaded live stock at the Chicago stockyards really lies between petitioners and the Director General. If the shippers should have done so, they have only discharged their lawful duty by paying the money herein sued for. If the Director General should have done so, he may yet discharge his obligation by payment to the shipper. But in either event, the Yards Company may not be required to reduce its lawful charges for the service.

Notwithstanding these circumstances, we desire to call attention to facts which justify the conclusion that the duty to load and unload live stock rested upon the shipper.

In its first report herein (Pltfs'. Ex. 1, R. 121, *et seq*), after a full and comprehensive discussion of the facts and the law, the Commission decided that the duty of loading and unloading live stock rested upon the shippers and that there could be no recovery by them of any amount paid by them for the service. In its second report (Pltfs'. Ex. 2, R. 141, *et seq.*) this conclusion is reversed, although no new evidence on the point had been introduced.

This reversal was undoubtedly occasioned by the passage of Section 15 (5) of the Act to Regulate Commerce, *supra*, which reads as follows:

> "Transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of

> outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary live stock, or the duty of performing service as to shipments other than those to or from public stockyards."

This amendment to the law became effective February 29, 1920. It is scarcely a reason for the Commission's holding in its second report (Pltfs'. Ex. 2, R. 144) that prior to February 29, 1920, the duty to load and unload live stock did not rest upon the shipper or consignee. On the contrary, the enactment of the law would seem to be a cogent reason for holding that prior to its enactment, the duty to load and unload did rest upon the shipper or consignee. Otherwise it is difficult to understand why there was any necessity for the passage of the law. As was held by the Commission in *Allied Packers* v. *A. T. & S. F. Ry. Co.*, 161 I. C. C. 641, 646, the enactment of this paragraph of the law is traceable to its holding in its first report in this case. The Commission further said at page 646 of its report in that case:

> "The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges to the line-haul charges on shipments of live stock to and from public stockyards. The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1, or to restrict our jurisdiction. The sense of the paragraph is that the services named

shall be performed at the carriers' expense without additional charge to the shipper."

It was doubtless out of deference to this view of the amendment that the Commission, in this case, sought to impose the expense of loading and unloading upon the Director General. No construction of the law, however, justifies its application prior to the date upon which it became effective. It will be observed that the paragraph makes an exception of other than ordinary live stock and all shipments of live stock other than those to or from public stockyards. The only inference that may be drawn from the language is that the obligation of shippers and consignees of live stock to load or unload the stock under all circumstances was recognized, and the paragraph enacted for the purpose of excepting the shipments therein specified from the application of the uniform rule.

Petitioners refer to no authority sustaining their contention. Their claim is that the final conclusion of the Commission with respect to the obligation to load or unload live stock is an administrative finding supported by evidence, and therefore binding upon the courts. The argument is founded upon a false premise, for it assumes that the finding was based upon a consideration of the line-haul rates and their application. This was not the case, for the line-haul rates for transportation were not in issue and were not considered. Their amount does not even appear in the record. Moreover, the tariffs of the Director General required the shipper or consignee of live stock to load or unload. The applicable provisions of the tariffs are reproduced at page 172 of the certified excerpts from original exhibits filed by petitioners. This requirement was certainly a condition of transportation at the rate in effect. A valid requirement by the Commission that the Director General's ob-

ligations be enlarged must have been preceded by a finding that the line-haul rates were too high if the shipper did the loading or unloading. Yet there is no such finding.

Clearly, the question of the duty to load and unload was one of law only. As stated by the Commission in its second report (R. 144) the facts were not in dispute, and nothing remained but to apply the law to those facts. A court had jurisdiction to do this.

A number of cases are cited in petitioners' brief as holding that the duty to load and unload live stock rests upon the line-haul carriers. With the exception of the decision of this court in *Covington* v. *Keith*, 139 U. S. 129, all the cases cited were actions to recover for loss and damage to shipments and are not in point. In the *Covington Case, supra,* this court did hold (p. 134) that the duty of a carrier to transport live stock includes the duty of furnishing facilities through which a proper delivery can be made (p. 135) and that a carrier cannot make a charge for the furnishing of such facilities, if furnished by itself or on its behalf.

The facts in that case were that an independent stockyards company operated the only unloading facilities which were available to the railroad. Those facilities were made available to the railroad under a contract which, as stated by this court (p. 131), made the stockyards the depot of the railroad for the delivery of live stock handled by it. It further appeared (p. 132) that the railroad had no other facilities through the use of which live stock transported by it could be delivered. This court, therefore, held (p. 136) that since the railroad had not furnished facilities of its own through which live stock could be delivered without additional

charge, the imposition of an additional charge was improper.

The case is distinguishable from the case at bar. In this case the evidence before the Commission established the fact that the line-haul carriers and the Director General had adequate facilities of their own in Chicago through which live stock could be delivered at no charge in addition to the line-haul rate for transportation. The Commission considered this evidence as unimportant, saying in its first report (R. 134):

> "Some testimony was offered as to the facilities of some of the carriers for receipt and delivery of live stock at points on their own rails within the city of Chicago. This has nothing to do with the question here in issue. There is no charge in the complaint that these facilities are not adequate for the receipt and delivery of all live stock which the shippers may desire to load at or consign to such points. A very large proportion, said to be as high as 98 per cent of the stock shipped to Chicago, is consigned to persons at the stockyards."

Petttioners were at all times able to secure a free delivery of live stock consigned to them at the yards operated by each of the line-haul carriers and could thus have avoided the payment of the loading and unloading charges of the Yards Company. To suit their own convenience they elected to take delivery at the yards of the Yards Company. Under these circumstances, the *Covington Case, supra,* imposed no obligation upon the line-haul carriers to make a free delivery at that point. Upon identical facts, the Commission itself distinguished the *Covington Case, supra,* in *Southwestern Horse & Mule Association* v. *A. T. & S. F. R. Co.* 129 I. C. C. 730, 736.

Petitioners' brief (p. 47) clearly shows that at no time did the line-haul carriers or the Director General undertake to load and unload live stock at the Chicago stock-

yards free of charge. As is said in the evidence quoted, the line-haul carriers paid the loading and unloading charges of 25 cents and 50 cents per car because they were compensated in the $2 terminal charge which they received. The terminal charge would have been larger, however, had the loading and unloading charges of the Yards Company exceeded 25 cents and 50 cents per car. In 1917, when those charges were increased to 50 cents and 75 cents a car, the payment of the increase by the line-haul carriers would have been equivalent to a reduction in their rates.

On the entire question of the legal obligation of shippers or consignees to load and unload live stock, the first report of the Commission (R. 130-132) is most complete and enlightening. The practices theretofore uniformly followed by the carriers of the country in connection with the loading and unloading of carload freight are discussed at length. The previous holdings of the Commission and the decisions of the courts are referred to. The decision of this court in the *Covington Case, supra,* is discussed and distinguished. The report of the Commission on this subject is in every way complete and correct and should be upheld. This point was presented to the District Court and the Circuit Court of Appeals as justifying a judgment in favor of the Yards Company, and requires the affirmance of the judgment of the latter court in so far as the Yards Company is concerned. The obligation to pay the charges sued for rested upon the shipper or consignee. Since the shippers have paid them, those charges cannot be recovered. And even if it be held that the obligation to pay them rested upon the Director General, there can still be no recovery from the Yards Company.

V.

CLAIMS FOR REPARATION BEFORE THE INTERSTATE COMMERCE COMMISSION AND SUITS IN COURT MUST BE BROUGHT IN THE NAMES OF THE REAL PARTIES IN INTEREST. WHO MAY MAINTAIN A SUIT IS A MATTER OF LAW. PETITIONERS DO NOT HAVE SUCH AN INTEREST AS ENTITLES THEM TO MAINTAIN THIS SUIT, EITHER IN THEIR OWN BEHALF OR AS FACTORS IN BEHALF OF THE SHIPPERS. THEY NEITHER PAID NOR BORE THE CHARGES SUED FOR AND WERE NOT DAMAGED AND CANNOT RECOVER.

At pages 75 to 96, inclusive, of their brief, petitioners argue that they are the proper parties in interest in this case and have a right to recover, either in their own names and right, or as factors or agents of the shippers. It was upon the ground that petitioners were not the parties in interest that a verdict was directed in the District Court. That was not, however, the ground upon which the decision of the Circuit Court of Appeals was based.

This point was assigned in the petition for certiorari filed herein (p. 18) as one relied upon for the allowance of the writ. This court also permitted the Commission to file a brief supporting the petition for certiorari, in which brief this court was requested to grant the writ in order that it might pass upon the point. And the brief on the merits, filed herein by the Commission as *amicus curiae*, deals only with this matter.

In view of the fact that the writ granted herein is to review the decision of the Circuit Court of Appeals, which did not pass on this point, we have been in some doubt as to the proper course for us to pursue. However, since both petitioners and the Commission have presented the point to this court for determination, we will present our argument thereon.

A.

THIS SUIT IS BROUGHT BY PETITIONERS IN THEIR OWN NAME AND RIGHT.

It is not contended by petitioners in this court that this suit was not brought by them in their own names and right. That this suit was so brought is certain. In paragraph 1 of the petition filed in the District Court it is said (R. 4) that the suit is brought by the plaintiff (petitioners) to recover from the defendants (respondents) certain amounts which plaintiffs allege were illegally collected by defendants for the service of loading and unloading live stock at the stockyards in Chicago. In paragraph 2 (R. 4) each petitioner is named as

> "being entitled to receive from the defendants hereinafter named the amounts respectively set forth in said order of the Commission."

In paragraph 6 (R. 11), it is said:

> "That this is a civil suit for damages by the plaintiffs against defendants for a violation of the Act of Congress known as the Act to Regulate Commerce."

In paragraph 22 (R. 18), it is alleged that the order of the Commission directed,—

> "the said defendants therein, and who are named herein, to pay the aforesaid damages to plaintiffs."

In the same paragraph it is alleged that,—

> "by reason of the premises, the defendants have become and are indebted to the plaintiffs."

These allegations of the petition need no construction. It cannot be doubted that the petition is a demand by petitioners, in their own names, for a judgment requiring respondents to pay to them in their own names, the sum sued for. Nowhere in the petition is there any allegation that petitioners were acting for anyone else or

that respondents are indebted to anybody except petitioners. This view was also held by counsel for petitioners when the matter was pending in the District Court. In their reasons assigned in support of the motion to vacate the judgment, counsel for petitioners say (R. 316) that it became apparent to them that the trial court directed a verdict in favor of the defendants,—

> "on the ground that plaintiffs had filed said petition in the above entitled cause in their individual capacities."

Recognizing that this was true, counsel prayed leave to amend and stated to the court (R. 317) that they,—

> "came to the conclusion that by a proper amendment to the petition filed in the above entitled cause, changing the capacity in which plaintiffs bring this suit, the cause of action set forth in the petition herein may be properly maintained."

Also, in their motion to amend the petition, petitioners said (R. 100) that:

> "Your petitioners brought this suit in their individual names as plaintiffs. * * *"

With respect to this matter the District Court said in its opinion, referring to petitioners (R. 66):

> "The action is brought in their individual names. It is not and does not purport to be brought in any representative capacity. The plaintiffs do not sue as assignees as was done in the case of *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117."

The Circuit Court of Appeals also said (R. 394):

> "The action does not purport to be brought by appellants otherwise than in their respective individual capacities. Indeed, with attention directly challenged to their right to sue, it was contended by their counsel that they had such right, and while most likely the shippers would have the benefit of any recovery, this was wholly within appellant's volition."

And in their brief filed in this court, it is said (p. 2):

> "Petitioners brought suit as plaintiffs in the District Court * * *."

In taking the position in court that they were entitled to recover in their own names and right, petitioners were consistent, for they took the same position before the Commission. They have never claimed a right of action by virtue of assignments, as was the case in *Spiller* v. *A. T. & S. F. Ry. Co.* 253 U. S. 117. Nor have they ever claimed a right to recover upon powers of attorney. It was testified that the Chicago Live Stock Exchange had powers of attorney from shippers upon all shipments (Defts.' Ex. 8, p. 160; R. 269), but the attitude of the Exchange with respect to such powers of attorney was reflected in the statement made by its counsel when interrogated with respect to them. He said (Defts.' Ex. 9, pp. 316, 317; R. 270):

> "No, they are not in the record and they are not going to be put in. We are not relying on them at all. They are just so much waste paper as far as this case is concerned."

Even had the powers of attorney been put in evidence and relied upon, they would not have been sufficient to support a proceeding in the name of petitioners or of the attorney named therein. Their only effect would have been to authorize the attorney to bring the proceeding in the name of his principal.

The attitude of petitioners is further reflected by other parts of the record made before the Commission, those parts being quoted by the trial court in its memorandum opinion of July 31, 1930. (R. 114, 115.) On these hearings it was definitely said by counsel for petitioners that the theory of the proceedings before the Commission was that petitioners had the legal right to collect the

money without disclosing what they did with it thereafter, and that having collected it they had the right to retain it (Defts.' Ex. 9, p. 236); that legally, petitioners had the right to collect the money and keep it, if they wanted to (Defts.' Ex. 9, p. 563).

The Commission said in its report of June 2, 1925 (Pltfs.' Ex. 3, R. 151) that petitioners,—

> "seek reimbursement in their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers, and also as factors and agents for and on behalf of the live-stock shippers who were the consignors."

Petitioners are then found to have been damaged, and entitled to reparation, as factors and agents. (R. 151, 152.) The order of December 12, 1927 (Pltfs.' Ex. 4, R. 157 *et seq.*) does not, however, award the reparation sued for herein, to petitioners as factors and agents for anybody. The finding of that order (R. 158) is that petitioners are entitled to the award, and after specifying the amounts due each petitioner, respondents are ordered to pay those amounts to petitioners (R. 208). The shippers are not mentioned in the order, nor is the alleged factorship of petitioners. The award of the Commission, therefore, was not to petitioners as factors for the shippers, but to them in their own right. Petitioners also take this position, for their brief in this court (p. 2) states that,—

> "the order of the Commission is premised on the exaction from the plaintiffs in this suit * * * of an additional charge of 25 cents per car for unloading live stock * * *."

It is thus plain that petitioners have at all times claimed a right of recovery in their own names and right; that the award of the Commission was to them and that this suit was brought on that theory. It is equally plain that if they do not have that right, they cannot recover.

B.

ALL CLAIMS MUST BE PROSECUTED IN THE NAME OF THE REAL PARTY IN INTEREST.

It is elementary that any claim in any form must be prosecuted in the name of the real party in interest and that the question of who may maintain any action is a matter of law and cannot be determined by agreement between the parties. In *Mackay* v. *Randolph Macon Coal Co.* 178 Fed. 881-884, (C. C. A. 8th Ct.) the question was whether the trustee of a mortgage or the bondholders were the proper parties to sue to recover a deficiency after exhausting the mortgaged property by foreclosure. In deciding the case, the court said at page 884:

> "In the present case the trustee under the mortgage is neither the holder nor the payee of the bonds. It clearly could not have maintained an action at law for their collection. We are aware that the fifteenth article of the mortgage authorizes the trustee to collect and recover the principal and interest of the bonds for the owners and holders thereof. This may have reference to their collection by the enforcement of the security. If that is not its meaning, we are of the opinion that it could not confer upon the trustee the right to maintain an independent action upon the bonds. Who may maintain a suit is a matter of law, not subject to be controlled by the private convention of parties. *Hybart* v. *Parker,* 4 C. B. (N. W. 209); *Evans* v. *Hooper,* 1 Q. B. Div. 45; *Gray* v. *Pearson,* L. R. 5 C. P. 568; *Knorr* v. *Bates,* 14 Misc. Rep. 507, 35 N. Y. Supp. 1060. Parties to a contract cannot confer upon a third party the naked right to sue thereon. Suits, whether under chancery or code practice, must be brought in the name of the real party in interest."

The cases cited in the opinion support the rule announced. In *Fitkin* v. *Century Oil Co.* 16 Fed. (2d) 22-24, (C. C. A. 2nd Circuit), the facts were similar to those in

Mackey v. *Randolph Macon Coal Co., supra.* There the court said:

> "Under the mortgage here considered, since the trustee is neither the holder nor the payee of the note, it could not maintain an action at law for the collection of any of the notes. Its authority to proceed under the mortgage to collect the principal and interest of the bonds has reference to the collection of or the enforcement of the security.
>
> The right to maintain a suit is a matter of law, and not subject to be controlled by private conventions of the parties. Suits must be in the name of the real parties in interest."

We know of no cases asserting a contrary rule. In *Spiller* v. *Atchison, Topeka & Santa Fe Railway Company,* 253 U. S. 117, the plaintiff sued on written assignments which had been executed by each shipper and was, therefore, the holder of the legal title to the claim.

It is true that after the Commission has found that a rate or practice is unlawful, any person damaged by reason thereof may sue to recover, even though not a party to the proceedings before the Commission. This was what was done in *Phillips Company* v. *Grand Trunk Western Railway Company,* 236 U. S. 663. But that case does not hold that a volunteer may sue in court on a claim, the title to which is in another party not before the court. No case so holds.

C.

PETITIONERS HAVE NO INTEREST IN FACT IN THE CHARGES HEREIN SUED FOR.

The facts with respect to what actually happened in connection with the payment of the loading and unloading charges of the Yards Company are not in dispute. Nor

is there any question as to the relationship which existed between petitioners and the shippers of the live stock. Petitioners were commission merchants as to all shipments in controversy. They received the shipments as such, sold the live stock, deducted from the proceeds all charges, including freight, yardage, commissions, and the unloading charge complained of, and remitted the balance to the shippers, usually before the Yards Company made collection from the commission men. The Yards Company collected the charges from the commission men twice a week, but the commission men remitted the net proceeds of the sales usually on the day of the sale, holding out the amount necessary to pay all charges, including their own.

D. C. Mosier, vice president of the Live Stock Exchange and chairman of its Transportation Committee, a commission man, member of one of petitioners, testified (Defts.'-Ex. 8, certified to this court, pp. 30 and 31):

> "When this stock is received at the yards by the commission men, they pay all the charges, the yardage charges, the freight terminal charges and remit to the shipper the net proceeds of the consignment. * * * The relationship between the farmer, producer or shipper, whichever you may call him, is very close. We transact his entire business. We not only sell his live stock and take a commission, but we are his agent in every respect; in the payment of his freight, in the filing of claims, both for undercharges and for damages in transit and it is our duty to look after his interests in every way."

Mr. Mosier also testified (Defts.' Ex. 8, p. 32):

> "Q. How are the financial relations between the commission man and the farmer carried in due course of business? Are they carried in open accounts; that is, do you carry a running account with each farmer?
>
> A. There are some accounts kept that way. In most cases or a good many cases, the shipper is re-

mitted for the net proceeds and that closes the account."

Mr. Mosier further testified (Defts.' Ex. 8, pp. 36 and 37):

"The position of the Chicago Live Stock Exchange and its individual members representing their customers, who are the shippers and producers of live stock, is that they are entitled—to this reparation—and that is why the proceedings were started, and when it is collected, if it is allowed, the shipper and producer will get every cent. Not one dime, not one nickel, will be taken by the Chicago Live Stock Exchange or any of its members for the collection of this amount."

Mr. Mosier further testified that he was a member of the firm of Rosenbaum Bros. Co., one of the petitioners, and (Defts.' Ex. 8, pp. 48 and 49):

"Q. As an individual and as a member of the firm of Rosenbaum & Co., do you claim any reparation in this matter?

A. We claim this reparation for our shipper as his agent.

Q. You say 'we.' To whom do you refer by 'we'?

A. To Rosenbaum Bros."

H. R. Park, traffic manager of the Exchange, testified (Defts.' Ex. 8, p. 98):

"The commission man places upon the waybill stub the correct weight and the waybill is then returned to the joint agent, who conducts some further clerical work in connection with the waybill, and it is then turned over by him to the Union Stock Yards & Transit Company, who submits to the commission merchant *twice a week*, statement of all the charges due from that commission merchant, the commission firm paying to the Union Stock Yards & Transit Company said freight charges, which in the cases involved in this hearing, included the unloading charge of 25c per car."

E. N. Cruse, secretary and treasurer of National Live

Stock Commission Company, a petitioner, testified (Defts.' Ex. 9, certified to this court, pp. 62-64):

"Q. When you paid that freight bill, what did you do with that twenty-five cents? Did you charge it against Eiler?

A. Charged it to the shipper. * * *

Q. And you have been reimbursed.

A. Yes, sir.

Q. So, as a matter of fact, your firm has not any claim at all against anybody for this unloading charge on its own account, have they?

A. As the agent of the shipper.

Q. Now, as representative of yourself, have you any claim?

A. No sir."

L. F. Weeks of Bowles Live Stock Commission Company, a petitioner, testified (Defts.' Ex. 9, p. 194):

"Q. Are these extra charges paid by your company on behalf of the shippers of live stock which you represent?

A. Yes, sir."

Wm. S. Burmeister, office manager of Martin Bros. & Co., a petitioner, testified (Defts.' Ex. 9, pp. 207, 209):

"Q. Were these charges paid by you on behalf of the shippers of live stock to you?

A. Yes, sir.

Q. And were they paid under the conditions of the relationship described in the testimony of Witnesses Mosier and Park?

A. Yes, sir."

Ralph Kennedy, office manager of Wood Brothers, a petitioner, testified (Defts.' Ex. 9, p. 230):

"Q. On whose behalf did you pay these charges?

A. On behalf of the owners of the live stock consigned to us.

Q. When you recover any amount of reparation in this case, what disposition will you make of the money?

A. It will be returned to the proper owners from whom it was collected.

Q. And those proper owners are the parties shown as the consignors?

A. As the consignors."

Fred D. Gillogly, of the firm of Gillogly & Co., a petitioner, testified (Defts.' Ex. 9, pp. 271 and 272):

"Q. Did the firm which you represent, to your knowledge, pay the extra charge for loading and unloading live stock on every shipment consigned to them at the Union Stock Yards while the extra charge was in effect?

A. Yes, sir.

Q. For whom did you pay these charges?

A. Paid them for the owner and consignor.

Q. The owners and consignors of the live stock?

A. Yes."

He further testified (Defts.' Ex. 9, p. 277):

"Q. On shipments that came into the yard on which this charge has been paid by your company, that charge as paid was subsequently passed on by you to the owner of the stock, was it not?

Mr. Hillyer: Do you know what he means by passed on?

A. Yes.

Q. (By Mr. Towner.) I mean by that you subsequently collected the amount that you paid here for loading and unloading from the owner of the stock, is that correct?

A. *Well, we deduct all charges before we pay the principal anything.*"

Chas. A. Wilson of W. W. Wilson & Co., a petitioner, testified (Defts.' Ex. 9, pp. 363, 364):

"Q. In every case where you paid this charge you collected the amount from the owner of the stock, didn't you?

A. Yes. * * *

Q. You got the 25 cents, though, from the shipper?

A. We paid that with *his own* money, not with *our* money."

Mr. Seth B. St. John of Brown-St. John Co., a peti-

tioner, testified (Defts.' Ex. 11, certified to this court, p. 953):

"Q. In every instance where you paid the unloading charge you collected that amount back from the shipper, didn't you?

A. Yes, sir.

Q. And, as the matter now stands, your firm isn't out of pocket any money by reason of the payment of these unloading charges?

A. *We are just simply deducting* the total amount of the expense of the shipment and *depositing to their credit the net amounts* after all of this expense is taken out."

The foregoing testimony is typical. It is said at page 81 of petitioners' brief, that the charges in question were paid by petitioners "out of their own funds", but this is incorrect. They may have been paid by petitioners' checks, but those checks were payable out of funds belonging to the shippers and derived from the sale of the live stock. The undoubted facts are that a substantial part of the charges herein sued for was paid by petitioners with money belonging to the shippers of the live stock and then in the hands of petitioners as commission men; that seldom did petitioners have any of their own money tied up in these charges; that in cases where they may have paid the charges prior to the sale of the stock, they promptly reimbursed themselves from the proceeds of the sale when made, and that while petitioners were doubtless the agents of the shippers for the purpose of receiving and selling the stock and remitting the net proceeds, that agency terminated and the account was closed when those proceeds were remitted to the shipper.

Notwithstanding these facts, petitioners insist that they are entitled to recover in their own names and for their own benefit. They acknowledge no obligation to account to anybody for any amounts recovered, although

some witnesses did announce their intention of passing any recovery on to the shippers. If there is a recovery by petitioners and there is no voluntary payment by them to the shippers, it is certain that the parties who actually paid the charges sued for will not be reimbursed. It is equally certain that petitioners, who have lost nothing by virtue of the payments in question, will profit to the exact extent of any recovery herein.

D.

PETITIONERS WERE NOT DAMAGED BY THE COLLECTION OF THE CHARGES SUED FOR AND CANNOT RECOVER IN THIS CASE. THEY ARE NOT THE PARTIES IN INTEREST.

As we have pointed out, this suit was brought by petitioners in their own name and right. As also appears from the Commission's reports and orders, the award by that body was to petitioners in their own name. In making the award in this case, the Commission followed its prior holding in the case of *Missouri Portland Cement Company* v. *Director General,* 88 I. C. C. 492. In that case the consignor of the shipments involved was given reparation by a majority of the Commission although it had recovered the charges complained of from the consignee after having originally paid them. This decision of the Commission, as pointed out at page 493 of its report, reversed its previous practice of awarding reparation only to parties who not only paid but bore the charges attacked. The two theories of the Commission are dealt with in the opinion of the lower court (R. 68, 69) and as there stated, the holdings of the Commission prior to the *Missouri Portland Cement Case, supra,* were reversed because of the construction placed by the Commission upon the decision of this court in *Southern Pacific Co.* v. *Darnell-Taenzer Co.* 245 U. S. 531.

The *Darnell-Taenzer* case arose out of the decision of the Commission in *Burgess, et al.* v. *Transcontinental Freight Bureau,* 13 I. C. C. 668, wherein the Commission found that the rate charged on hardwood lumber from eastern points of production to the Pacific Coast had been unreasonable and awarded reparation. Complainants were the consignors of the lumber and it appeared that they had sold f. o. b. destination. The consignees paid the freight charges on delivery and deducted those charges in making settlement with the shipper for the lumber. The Commission held that although the consignees had physically paid the charges, that is, as the Commission said "taken the first step," they having deducted the same in making settlement with the shippers, the shippers (consignors) had actually borne the freight charges as such and were entitled to the award of reparation. Thus, in that case, the shippers who were the complainants, were in the same position as the shippers here, and the consignees were in the same position as petitioners here.

The defendants refused to pay the award on the ground that although the complainants (consignors) had actually paid and borne the freight charges as such, they had not been injured inasmuch as they had passed those charges on to the consumer in the price for their lumber. Suit was brought in the Circuit Court to enforce the award. A demurrer to the declaration was sustained (190 Fed. 659). On appeal, the Circuit Court of Appeals reversed the judgment of the trial court (221 Fed. 890) and remanded the case for a new trial.

In reply to the carriers' contention that the consumer alone was damaged by the payment of the excessive freight charges, the Court of Appeals quoted the fol-

lowing from the opinion of the Commission in *Nicola, etc.* v. *L. & N. Ry. Co.* 14 I. C. C. 199, 208:

> "The suggestion * * * would, if followed, lead the Commission away from the direct results of the act of the carrier in the establishment and exaction of an unjust rate into the domain of indirect and remote consequences and perhaps into questions of equity between the vendor and vendee of the lumber. The vendor sells the lumber for the best price he can get, and the vendee buys at as low a figure as he can. The price which the one is able to get and the other must pay is of necessity fixed or controlled by many influences, including, of course, the transportation charges. * * * We do not understand that the act to regulate commerce contemplates or authorizes the application by the Commission of its provisions in respect to reparation on account of unreasonable rates in such manner. Whatever a court of equity might be able to do and be justified in doing in dealing with the relations between vendor and vendee of the lumber in reference to the rates or other considerations, the Commission is confined in the making of awards for reparation to the injury or damage sustained by those who are the real and substantial parties at interest in the transaction in which such transportation charges have been made. The reparation is due to the person who has been required to pay the excessive charge as the price of transportation. It follows that we must, in making orders of reparation in these cases, upon proper proof of the shipments, make such orders in favor of those who paid the charges as freight charges, or on whose account the same were paid, and who were the true owners of the property transported during the period of transportation."

The court also quoted from what the Commission said in its first report in the *Burgess Case*, 13 I. C. C. 680:

> "If complainants were obliged to follow every transaction to its ultimate result, and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them."

Upon a new trial in the District Court the jury was instructed that if it found the rate charged unreasonable and that prescribed by the Interstate Commerce Commission reasonable, it should find for the plaintiffs, in accordance with the Commission's award. The jury found for the plaintiffs and this judgment was affirmed by the Circuit Court of Appeals at 229 Fed. 1022. Upon appeal to this court, the judgment was affirmed, thus upholding the decision of the Commission that although the consignee may have physically paid the freight charges, yet if he deducts those charges in settlement with the consignor, the consignor is the person who actually bears the charges and is the party injured and is entitled to the award of reparation.

The effect of the decision of this court in the *Darnell-Taenzer Case, supra*, is well stated by the District Court in the case at bar, where it is said (R. 71):

> "As this court interprets the *Darnell-Taenzer case*, it simply holds that the court, in a suit on a reparation award, will not inquire into the commercial effect of the payment of an illegal freight rate. What the court refers to, in the *Darnell-Taenzer case*, is the economic incidence of the payment of the excessive charge. Who, in an economic sense, ultimately bears the payment is a matter into which the court will not inquire. The economic bearer of the burden, be he purchaser or consumer, is not a proper party plaintiff. Neither can the defendant absolve itself from the payment of damages because, in an economic sense, the plaintiff might add the excess price to his product and itself impose the burden or injury upon the consumer."

We submit that the Commission erred in considering the decision in the *Darnell-Taenzer Case, supra*, as an authority for departing from its previous practice of awarding reparation only to those parties who had borne the charges condemned, and that the decision of the

Commission in the *Missouri-Portland Cement Case, supra,* was due to a misapprehension of what this court had decided.

The case of *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.* 269 U. S. 217, is also directly in point. In that case the plaintiff was the consignor of the shipments on which it was awarded reparation. The shipments were sold at a delivered price *f. o. b. destination.* The purchaser (consignee) paid the freight bill upon delivery of the shipments and remitted to the plaintiff the amount of the purchase price, less the freight charges.

The Commission, at 60 I. C. C. 595, awarded reparation to the Sloss-Sheffield Company, the shipper, although the freight charges had been physically paid by the consignee, for the reason, as stated by the Commission, that the shipper had actually paid and borne the charges. Suit was brought to enforce the award. When the case was considered in the Circuit Court of Appeals (295 Fed. 57), that court said at page 58:

> "The freight charge cannot well be regarded as paid or borne by a consignee when the payment is made with money to which the consignor is entitled; and in pursuance of a contract obligation of the consignee to the consignor. As the freight was paid by the consignor's debtor, who thereby, pursuant to contract, reduced his debt by the amount of the freight, such payment is to be considered as originally made by the consignor."

The case finally reached this court. In deciding it, this court said at pages 234 and 235 of its decision:

> "It is claimed that the Sloss-Sheffield Company cannot recover because it was not damaged by the excessive freight charges."

At page 235 it was also said:

> "The Commission and the District Court found that the Sloss-Sheffield Company bore the transportation charges and was damaged to the extent of the

difference between the charges paid and those that would have accrued at the rates found reasonable. Both tribunals found further that all the iron was sold f. o. b. destination; that it was shipped to purchasers named as consignees on straight bills of lading; that it was invoiced and charged on the seller's books at the full delivered price; that, pursuant to arrangement between seller and purchaser, the consignee physically paid the freight upon acceptance of the delivery; and that he was credited with this at the rate specified in the sales contract as a part payment of the purchase price, and remitted only the balance of the purchase price."

And again on page 235 it was said:

"It was likewise settled by *Southern Pacific* v. *Darnell-Taenzer Lumber Co.* (See *Darnell-Taenzer Lumber Co.* v. *Southern Pacific Co.*). (See 190 F. 659; 221 F. 890), that where goods are sold f. o. b. destination, it is ordinarily the seller who bears the freight, who suffers from the excessive charge, and who *consequently is entitled to sue.* (Italics ours.)

In this connection, attention is called to the footnote on page 236 of this court's opinion in which reference is made to a large number of decisions by the Commission, in all of which it had held that the person actually bearing the freight charges was the party entitled to the award of reparation. In that note no reference whatever is made to the Commission's opinion in the *Missouri-Portland Cement Case, supra.*

In *Illinois Central R. Co.* v. *Vest, et al.* 39 Fed. (2d) 658, on plaintiff's motion for a temporary injunction against enforcement of an order of the Railroad Commission of Kentucky, the court said at page 660:

"The rule is that, where a shipper pays a rate held to be unreasonable, he may recover the excess and need only show that he paid and bore the charges, and neither the Commission nor the court will inquire whether, in the course of his business, he recouped his losses or passed them on to others. This was held in *Southern Pacific Co.* v. *Darnell Lumber*

Co. 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451, and reaffirmed in *L. & N. R. Co.* v. *Sloss-Sheffield Co.* 269 U. S. 217, 46 S. Ct. 73, 70 L. Ed. 242. The questions of counsel for the railroad company to which objections were sustained dealt with the subject of passing the charges on to others, which, under these authorities, was not open."

We submit that these cases dispose of the car at bar. Petitioners are in precisely the same position as were the consignees in the *Darnell-Taenzer* and *Sloss-Sheffield Cases, supra.* They paid the charges herein sued for with the shipper's money and for his account. They have no investment in those charges and were never damaged by their payment. If anyone had a right to recover those charges, it was the shippers, whose money paid them. The shippers here are in precisely the same position as the shippers in the two cases cited and who were permitted to recover.

The doctrine of the *Missouri Portland Cement Case, supra,* the authority upon which the award in this case was made, has never received the sanction of the full Commission. Even in its report of June 2, 1925, in this case (Pltfs.' Ex. 3, R. 147), four Commissioners joined in the award only as constrained to by the decision of the majority in the *Missouri Portland Cement Case* (R. 156). While the Commission has since followed the doctrine of that case, there has always been a substantial minority in opposition thereto. As late as November 4, 1930, in the case of *General, etc. Corp.* v. *Southern Ry.* 169 I. C. C. 83, four of the eleven Commissioners dissented from a majority award of reparation based upon the doctrine of the *Missouri Portland Cement Case, supra,* and one concurred only because of the desirability of consistency in the Commission's reports. Moreover, in that case, as pointed out by the Commission (p. 84), the complainant

"paid the freight charges out of its own money and, therefore, has a legal interest in the proceedings."

And even under the theory of the Commission and petitioners, there can be no recovery in this case. In both the *Darnell-Taenzer Case* and the *Sloss-Sheffield Case*, the Commission found that the rates assailed were unreasonable; that is, that they violated Section 1 of the Act to Regulate Commerce. This was also true in the *Missouri Portland Cement Case, supra.* With respect to this fact, this court held, in its decision in the *Sloss-Sheffield Case, supra* (p. 235), that under the *Darnell-Taenzer Case, supra,*

> "a recovery for excessive charges can be had under Section 1 (of the Act to Regulate Commerce) without specific proof of pecuniary loss . . . ."

In the case at bar, however, there is no award of reparation on the ground of any violation of Section 1 of the Act. There is no finding that the charges of either respondent were unreasonable. On the contrary, the reasonableness of the charges of the Yards Company was not attacked (R. 135), and the Commission said it was not necessary to pass on the question. (R. 145.)

There is nothing new in the theory that the person damaged by an act is the person entitled to a recovery. Section 8 of the Act to Regulate Commerce (U. S. C. A., Title 49, Sec. 1 to 15a, pp. 316, 317) so provides in the case of a violation of that Act by a common carrier. In *Parsons* v. *C. & N. W. Ry. Co.* 167 U. S. 447, the action was brought to recover damages on account of alleged violations of the Interstate Commerce Act. This court said at page 460:

> "The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this Act.' So before any party can recover under this Act, he must show not only the wrong of the carrier, but that that wrong

> has in fact operated to his injury. We think . . . the plaintiff has failed in that full and clear showing of injury which is necessary in order to justify a recovery under the Interstate Commerce Act."

In *Knudson, etc. Co.* v. *Michigan Central R. Co.* 148 Fed. 968, the action was to recover damages under Section 8 of the Act. The court said at page 974:

> "To support a recovery under this section, there must be a showing of some specific pecuniary injury."

This suit is to recover compensation for an injury alleged to have been done. The Commission itself has held that proceedings before it to recover reparation are proceedings to recover damages for an injury. *Southern Pine Lumber Co.* v. *Southern R. Co.* 14 I. C. C. 195, 197. In *Pennsylvania R. Co.* v. *International Coal Company*, 230 U. S. 184, it is said at page 200, referring to the Act:

> "On the civil side, the act provided for compensation, not punishment."

In *Spiller* v. *A. T. & S. F. Ry. Co., et al.* 253 U. S. 117, this court said at page 135:

> "A claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty, but for compensation."

See also *Davis* v. *Portland Seed Co.* 254 U. S. 403, 418. The payment of compensation infers a previous damage or improper payment. Yet in this case, petitioners sustained no such damage and made no such payment.

The cases cited in petitioners' brief (pp. 78-86) and relating to suits by and against carriers for loss, damage or overcharge, have no application here. This suit is brought under the provisions of the Act to Regulate Commerce, not upon any common-law right. It was brought before the Commission under Section 9 of the Act, the right of action being one provided for by Sec-

tion 8. Section 8 specifically provides that the liability of a carrier for doing anything prohibited by the Act shall be "to the person or persons injured thereby." This limitation fixes the rights of petitioners.

Petitioners also cite *Consolidated Cut Stone Co.* v. *A. T. & S. F. Ry.* 39 Fed. (2d) 661. In that case, the suit was brought by the consignee, the buyer, upon a finding by the Commission that the rates charged on the shipment involved were unreasonable. The suit was defended on the ground that while the consignee had paid the charges, he collected the amount of them from the shipper, and was, therefor, not damaged. The District Court, however, held that under the facts, the consignee both paid and ultimately bore the charges. It was pointed out (p. 662) that the consignor acknowledged that under the contract of sale, the consignee was entitled to any reduction in freight charges. The court also said at page 662:

> "In the *Sloss-Sheffield Case, supra,* it was held that 'the purchaser who paid the freight did so solely as agent for the seller.' The goods were sold f. o. b. destination. No so in the case here, as the stone was sold f. o. b. quarries. In the case at bar the consignor routed the stone as directed by the plaintiff, and acted as its agent therein. Title to the stone passed to consignee when loaded on the cars at the quarries and was billed to consignee."

Judgment therefor went for plaintiff, and was affirmed on appeal (47 Fed. (2nd) 226), the Circuit Court of Appeals agreeing with the District Court that under the facts, the consignee (plaintiff) actually paid and bore the charges sued for. A petition for certiorari in the case was denied by this court at 283 U. S. 843. The case does not hold contrary to our view. In fact, it supports our argument, since judgment went for the plaintiff, not because it paid the charges, but because it was the party

actually damaged by the payment. It is because petitioners were not damaged by the payment of the amounts sued for herein that they should not be permitted to recover.

From the foregoing it is quite obvious that petitioners are not entitled to recover the reparation here sued for in their own name and right. Not only would such a recovery be contrary to the law, but it would be contrary to reason and justice, even if we assume an improper collection, which we deny. If petitioners are entitled to a recovery in their own name and right, what then becomes of the rights of the shipper, who, according to all of the evidence in the record, is the man who actually paid the charges? It is true, as we have pointed out, that there were some statements made on the record of the intention of petitioners to pass any collection on to the shipper, but any legal obligation to do so was denied. Certainly a voluntary statement of intention on the part of individual petitioners cannot be given the legal effect of conferring upon them any right to prosecute this action in their own name.

Common justice would seem to bar any rights of petitioners in this case. They are out nothing. If they fail to recover, they are in no worse financial condition. They have been deprived of nothing by the collection of the charges sought to be recovered. It follows that if they are permitted to recover, this action will be a source of profit to them. They will have acquired money which they never had before. A damage done them by respondents will not have been repaired, since they have never sustained such a damage, but they will have something for which they gave nothing. It will rest with them to decide whether or not they will pay the amount of any recovery to the shippers who actually disbursed the

money sued for herein, assuming that those shippers are still alive to receive it.

As stated by the trial court in its opinion herein (R. 77), petitioners are volunteers who have undertaken to do something for the shippers, and by virtue of this undertaking, seek to impose a legal obligation upon respondents, while at the same time denying any resulting legal obligation to report back to the parties on whose behalf they claim to be acting.

We submit that the Commission erred in its decision in the *Missouri Portland Cement Case, supra,* and cases following that case. It has misconstrued and misapplied the decision of this court in the *Darnell-Taenzer Case, supra.* That this is so, is sufficiently proved by the undisputed fact that petitioners would profit, if permitted a recovery in this case, while the shippers who paid the money sued for are left without remedy. It is to be assumed that even the Commission had some misgivings on the subject for in its second report (Pltfs.' Ex. 2; R. 146) it found that the *shippers* had been damaged and were entitled to recover. Petitioners alleged rights were not referred to until the Commission made its third decision. (Pltfs.' Ex. 3; R. 147 *et seq.*)

The Commission has filed a brief herein as *amicus curiae* which deals entirely with this question. It has presented the same arguments as petitioners and supported them by the same cases. Much weight is attached to the decision of this court in *N. Y. C. R. Co.* v. *York, etc. Co.,* 256 U. S. 406, although it has no relation to the issue. This court there upheld an implied contractual obligation. We are here concerned with an attempt to make a recovery through a statutory proceeding, brought under a statute which prescribes the conditions under which there may be such a recovery. The

Commission's brief also errs in fact by assuming that any recovery by petitioners would accrue to the shippers and that the Commission so intended. The fact is that the Commission made no such limitation in the order sued on herein, and that petitioners have expressly denied any obligation to pass any recovery on to the shippers who actually paid the money. Nor do petitioners assert any right of the shippers in this court. They are here claiming a recovery for their own benefit.

At page 16 of its brief, the Commission refers to the alleged impracticability of a recovery by the shippers in their own name. Whether or not this is so is unimportant, for the convenience of the Commission and the shippers cannot be made the measure of respondents' rights and liabilities. *Kansas City Southern R. Co.* v. *United States,* 252 U. S. 178, 187, 188; *Interstate Commerce Commission* v. *Stickney, supra.*

The Commission also errs in fact (pp. 23, 24, Commission's brief) in assuming that the charges herein sued for were not paid with the shippers' money. The record shows that they were. Nor is this fact unimportant, for how could petitioners possibly be injured if they never spent any of their money in paying the charges? Nor has this court ever held that a party paying charges has been damaged by that fact alone (p. 30, Commission's brief). In both the *Darnell-Taenzer Case, supra,* and the *Sloss-Sheffield Case, supra,* the successful party had not only paid the charges, but had actually borne them. In neither case had the plaintiff been able to recover the charges, as such, from someone else. Something more is required than that a plaintiff should be a party to the transportation contract and that he should have paid the charges and be liable for undercharges. In addition, he must have been really damaged by the payment.

The Commission's brief reduces to the statement on page 35 thereof, that a consignee who has physically paid charges may recover them even if not damaged, if the shipper who has actually been damaged by the payment makes no objection. This is stated to be the rule now followed by the Commission. It is a convenient method of always requiring a defendant to pay reparation, but is an obviously incorrect application of the statute under which such recoveries are sought. A failure of a damaged party to claim a recovery confers no rights upon a party who has not been damaged. It does not, in itself, constitute a transference of the right to sue. The party who has suffered the damage still remains as the only party who may recover compensation for that damage.

This case is a good illustration of the manner in which the Commission's theory works. Because the shippers, who actually sustained the alleged damage have not objected, the Commission has granted a recovery to petitioners, who were not damaged in any way. It has given petitioners a right of recovery which, if sustained, will give them something they have never had; which will compensate them for an injury and loss they have never sustained. Such an application of the law merits and should receive condemnation. We submit that since the Act to Regulate Commerce limits such a recovery as is here sought to parties that have sustained damage, and since petitioners have not been damaged, the order of the Commission awarding reparation to them is invalid and no recovery can be made thereon.

E.

PETITIONERS CANNOT RECOVER IN THIS CASE AS FACTORS OR AGENTS FOR THE SHIPPERS.

As an alternative to their claimed right to collect in their own names, petitioners urge (pp. 87-96, petitioners' brief) their right to collect as factors or agents for the shippers. Whether or not they took this position before the Commission is somewhat uncertain, as at some times the counsel then representing them insisted upon their right to recover in their own right, and at other times insisted upon their right to recover as factors for the shippers. The order sued on, however, awards reparation to petitioners in their own name and right, and, certainly, this suit was not brought by petitioners as factors or agents for anybody. For this reason petitioners cannot recover in this case as factors and agents for the shippers, and what their rights might be in an action brought as factors or agents is of no importance. Nevertheless, the opinion of the District Court deals with the right of petitioners to recover as factors or agents (R. 73 *et seq.*) and correctly disposes of the question.

Petitioners cite the familiar rule that a commission merchant or factor entrusted with the custody of property for sale has a special interest in the property, and if it is damaged while in his possession, he can sue the wrongdoer in his own name and recover; or having sold the property and having a special interest in the proceeds of the sale, may sue in his own name to recover the same. We have no quarrel with this contention, but say the doctrine invoked has no application here. It does not apply after the transaction has been ended and after the relation has terminated, as was true in the

case of each shipment involved in this suit. The doctrine is based upon the interest of the factor, and when that interest ceases to exist, his rights to sue also cease to exist. Petitioners cite no authority which does not show an existing interest of the factor either in the property or in the proceeds of the sale.

Hamilton v. *Dillon,* 11 Fed. Cas. 332 (p. 89, petitioners' brief) was decided in 1871. Petitioners' brief correctly quotes part of the judge's charge to the jury. As a preliminary to this declaration of law, the court also said (p. 334):

> "I regret that the briefness of the time intervening between the trial of the case and my enforced departure to Memphis to open the courts there at the appointed time for the Western district, has precluded a more elaborate consideration than I have been able to bestow upon the points discussed by the counsel upon both sides, and I would hardly be willing now to act in the premises if I were not satisfied that, whatever the result may be here, the unsuccessful party will renew the contest in the supreme court of the nation, a legally infallible tribunal, upon which, therefore, will be devolved the responsibility of disposing of the case."

The judgment of the lower court for defendant was affirmed in this court (88 U. S. 73) but without any statement of plaintiffs' rights as factors.

In *Smith & Son* v. *Blohm,* 159 Iowa 592 (141 N. W. 32), cited by counsel (p. 90, petitioners' brief), the plaintiffs were commission men at Omaha Stock Yards. They had received a consignment of sheep for sale as such commission men. They sold the sheep in their own name to the defendant Blohm and remitted the net proceeds on the basis of the sale to the shipper. Blohm repudiated the contract and the commission men who had sold to him in their own names and had remitted the net proceeds on the basis of the sale to the shipper, were per-

mitted to recover. They had an interest in the proceeds of the sale to the extent of the full amount thereof, having remitted to the shipper.

In *Progress Blue Ribbon Farms* v. *Chicago Horse Sales Co.* 153 Wis. 249 (140 N. W. 1132), cited by counsel (p. 90, petitioners' brief), a like situation existed. The Chicago Horse Sales Co. had sold for W. P. Dickinson and others certain stock and had accepted from the purchaser a draft in payment. The Sales Company remitted the net proceeds to Dickinson. The draft was on one Dunbar payable at a Milwaukee bank. Before the draft was presented, Dunbar was garnished by Progress Blue Ribbon Farms as a supposed debtor of Dickinson. The question presented was whether the money payable on the draft was the property of the Sales Company or of Dickinson. If of Dickinson, it was subject to garnishment. If of the Sales Company, it was not. In holding it was the property of the Sales Company, the court said:

> "The general rule is that a person employed to sell another's property at auction, or a factor to whom property has been assigned for sale, has an interest, upon a sale being made, in the proceeds, entitling him to sue and recover the same in his own name and, in case of his paying the net proceeds and delivering the property before receiving payment from the buyer, as in this case, and the principal accepts and retains the money the agent is entitled to recover of such buyer for his own use."

Undoubtedly the decisions in the *Blohm* and *Blue Ribbon* cases state the rule as applicable to the facts therein. In the case of *Beardsley et al.* v. *Schmidt, et al.* 120 Wis. 405 (98 N. W. 235) cited by counsel (p. 91, petitioners' brief), the rule is, we think, also announced. The court in that case said:

> "This implied authority of the factor to sell in his own name and to maintain an action in his own name to recover the purchase price grows out of the

> fact that the nature of the relations between the principal and the agent, and the latter and the purchaser, are such that as between the two latter, the agent is deemed to be the owner of the property. He has, as against his principal in the absence of some stipulation to the contrary, a special interest therein and the proceeds thereof, and the right to control the same till he receives his compensation for services rendered in respect thereto. Story on Agency, Section 111."

Special interest is thus seen to be the basis of the right of the factor to sue either for damage to the property or for proceeds of the sale. The reason for the rule being the special interest, the rule ceases to have application where the special interest no longer exists.

Nor does the decision in *Spiller* v. *A. T. & S. F. Ry. Co.* 253 U. S. 117 (p. 94, petitioners' brief) help petitioners. The plaintiff in that case sued on assignments which vested legal title to the claims in him. The purpose of the assignments was not important. What was important was that under the assignments, Spiller had a right to sue in his own name and right. Petitioners may also have powers of attorney, but they were not proven of record and this suit is not based on them.

A case identical in its facts with the case at bar was presented in *North American Co.* v. *St. Louis & San Francisco R. R. Company, et al.*, a receivership proceeding in the District Court of the United States for the Eastern Division of the Eastern District of Missouri. The Interstate Commerce Commission had awarded reparation on some cotton shipments to commission merchants in the case of *Memphis Freight Bureau* v. *St. Louis & S. F. Railway Co.* 57 I. C. C. 212.

The testimony before the Commission supporting the award to the cotton factors was substantially the same as the testimony in the case at bar, being to the effect

that the commission men presented claims for their shippers and that the railroads dealt with them in adjusting claims. The commission men filed claim in the receivership proceeding, basing their claim upon the award of the Interstate Commerce Commission. Judge Walter S. Sanborn, Circuit Judge, denied their right to prosecute and recover on the claims. The only question before him was whether they had such interest as would permit them to recover. The opinion was not reported, but a certified copy thereof is attached to the brief of the Director General herein, as an appendix thereto. In the course of the opinion, Judge Sanborn said:

> "The interveners, however, pray that the payment be made to the factors. The defendant objects that the factors were not the parties damaged. The commission so held and there is substantial—nay, conclusive evidence—that the factors did not and that the country growers and shippers did suffer and bear the substantial damage. Notwithstanding this fact, and notwithstanding the fact that the commission itself reported and found that the factors in their representative capacity were not entitled to the reparation, its subsequent order was that the receivers be authorized and directed to pay the reparation to the factors without making any reference to their representative capacity. * * *
>
> The factors insist that this court should order the amount of the reparation paid to them. But since they did not, and the growers and shippers did suffer and bear the damages the court is not persuaded that they have either the property rights in the claim for damages or the authority to release or assign them. *While, so long as a factor is engaged in discharging his active duty of paying the freight charge including the overcharge and remitting the proceeds, he may have authority to settle, compromise or release the claim of his principal for the refund of the overcharge, because during that time he has a pecuniary interest in the claim for the refund, yet; when such a transaction is completed, without more, the property right of the shipper in the claim*

for the refund becomes exclusive and the factor's right or power to release, discharge, or assign it no longer exists." (Italics ours.)

Judge Sanborn accordingly denied the right of the cotton factors to recover. Undoubtedly the rule announced by him correctly states the law. When the factor has completed the transaction, has received his compensation and has remitted the net proceeds to his principal he has no longer a pecuniary interest and is no longer in a position to prosecute in his own name claims for damage to which a principal only is entitled.

Reason supports this conclusion in the case at bar. Petitioners deny any obligation to turn any recovery over to their alleged principals. They claim the right, at least, to retain such a recovery if they see fit. Such a claim is scarcely consistent with a factorship or agency. And if petitioners did choose to retain any amount recovered, we would have the odd situation of a factor or agent benefitting by a recovery made through his representation of somebody else, the principal, meanwhile, being left to suffer. Such a situation is opposed to all reason and justice.

We submit that the decision of the District Court with respect to the right of petitioners to recover as factors and agents for the shippers was right and that it should be affirmed; assuming, of course, that the question may be made an issue in a case not brought by petitioners as factors and agents.

VI.

THE ORDER SUED ON AWARDS REPARATION AGAINST THE YARDS COMPANY ON INTRASTATE ILLINOIS SHIPMENTS, AND IS, THEREFORE, INVALID AS TO IT, SINCE THE COMMISSION HAD NO JURISDICTION TO AWARD SUCH REPARATION.

The issues raised in the complaints filed with the Commission under its Docket Numbers 9977 and 12614, in so far as reparation is concerned, are defined in the Commission's report dated June 2, 1925. (R. 147.) In that report it is stated that the complaint in Docket 9977, filed November 7, 1917, put in issue only interstate shipments. (R. 148.) It is also stated that the issues in Docket 12614 are substantially the same as those in Docket 9977, except that Docket 12614 covers shipments within the State of Illinois during the period of federal control, and includes interstate shipments from the date of filing the first complaint to the end of the reparation period. (R. 149.) It is further said (R. 149):

> "By virtue of paragraphs (c) and (f) of Section 206 of the transportation act, 1920, the complaint in No. 12614 embraces all shipments, other than those intrastate outside of the period of Federal control, which moved, during the period of two years, plus the Federal control period, which preceded the filing of the complaint. * * * The shipments embraced in the reparation claims fall into two general classes, namely, interstate shipments throughout the reparation period, including those made prior and subsequent to, as well as during Federal control, and intrastate shipments during Federal control."

Further, in making its finding in this report, the Commission said that the collection of separate charges for loading and unloading, in addition to the line-haul rates (R. 150),

> "on interstate shipments during the reparation period hereinbefore defined, and intrastate ship-

ments during the period of Federal control, was an unlawful and unreasonable practice."

It thus definitely appears from this report of the Commission that the award sued on includes reparation on intrastate shipments moving within the State of Illinois during the period of federal control. This conclusion is affirmed by Mr. Park, who testified that the amount of reparation awarded by the Commission included shipments moving in both interstate and intrastate commerce during the reparation period. (R. 225.) From the order sued on (Pltfs.' Ex. 4, R. 157 *et seq.*) it appears that in the case of each amount listed, the Director General and the Yards Company are the defendants who are required to pay.

Section 1(2) of the Act to Regulate Commerce, under which the Commission functions (Title 49, U. S. C. A., paragraphs 1 to 15a, pp. 32, 33) provides that the act shall not apply,—

> "to the transportation of passengers or property or to the receiving, delivering, storing or handling of property wholly within one state and not shipped to or from a foreign country."

The only exception to this provision is contained in Section 13 (U. S. C. A., Title 49, Sec. 1 to 15a, pp. 377, 378) where the Commission is given jurisdiction to remove a discrimination arising from the maintenance of state rates, but that section is not in issue here as it is not mentioned in any complaint nor in the Commission's order. The Commission's only other jurisdiction over state rates is that contained in Section 206(c) of the Transportation Act, shown at page 357 of the U. S. C. A. (Title 49, paragraphs 16 to end) in which the Commission is given jurisdiction to award reparation on intrastate traffic during the period of federal control, in case the

charges complained of have been collected by the President. This means that the Commission's jurisdiction to award reparation on intrastate shipments during federal control was limited to carriers under federal control. In *Pacific Lumber Company* v. *N. W. P. Railroad*, 51 I. C. C. 738, the Commission said at page 768, that the Act to Regulate Commerce governed the defendants not under federal control.

The stipulation offered in this case as Defendants' Exhibit 1 (R. 243) provides that the Yards Company was never under federal control (R. 233) and this fact also appears from the evidence and the report of the Commission dated February 11, 1919 (R. 139). The situation is, therefore, that the Commission, without having any statutory or other authority to do so, has awarded reparation on intrastate shipments during the period of federal control against the Yards Company which was never under federal control. To the extent that it has done so, its award is void as to the Yards Company.

The portion of its total award subject to this objection is not shown by any evidence. Exhibit 1-A before the Commission, offered as Exhibit 37 in the trial court (R. 283) and certified to this court, shows the point from which shipments moved, but without showing the state, and does not segregate the state and interstate shipments, nor the amount due on each class of traffic. It was the only evidence offered in the hearings before the Commission or in court to show the points of origin of any of the shipments on which reparation was asked. A representative page of this exhibit is reproduced at page 163 of the Certified Excerpts from Original Exhibits, filed herein by petitioners.

From this representative page it is obvious that the exhibit does show whether any shipment moved in intra-

state or interstate transportation. For example, there is a town named Clayton in Illinois, Indiana, Iowa and Missouri. If the third shipment on the representative sheet of Exhibit 1-A before the Commission (Ex. 37 in court) moved from Clayton, Illinois, it was undoubtedly an intrastate shipment. If it moved from Clayton in Indiana, Iowa or Missouri, it was an interstate shipment. There is no evidence of record, however, which shows what the fact was. It is only certain that to some extent, the award of reparation covers interstate shipments, and to some extent covers intrastate shipments.

Certainly, to the extent that the order of the Commission awards reparation against the Yards Company on intrastate shipments moving during the period of federal control, the order is illegal and void, since the Commission had no statutory or other jurisdiction to award such reparation. In making the order sued on, the Commission apparently assumed that the Yards Company had been under federal control, although it had previously found that this was not the case. Being invalid as to a part of the reparation awarded and the proof of petitioners not showing to what extent the award is valid, the entire order must be held invalid as to the Yards Company.

It is true that the order sued on is presumed to be valid and is prima facie evidence of the facts therein stated. The Yards Company, however, has rebutted this presumption by showing that to some extent, the Commission exceeded its jurisdictional power in making the order. The burden then rested upon petitioners to show by proper proof, either that the Commission had jurisdiction to award reparation against the Yards Company on intrastate traffic, or the amount due from the Yards Company on interstate traffic. Neither of these

things was done. The whole order must therefore be held bad as to the Yards Company, since some part of it was beyond the Commission's jurisdiction. Certainly, the entire award cannot be held valid under a finding that the Commission had jurisdiction to make part of it and no jurisdiction to make the other part. Such a holding would operate to confer upon the Commission a jurisdiction over intrastate traffic not conferred upon it by statute and denied by the courts.

This point was urged upon the District Court in the motion filed by the Yards Company for a directed verdict (R. 304), and upon the Circuit Court of Appeals. While not referred to in the opinions of either of those courts, it is a ground upon which the judgment can and should be sustained.

VII.

THE COMMISSION WAS WITHOUT JURISDICTION TO AWARD REPARATION AGAINST THE YARDS COMPANY IN ITS DOCKET NO. 9977, AND HAVING DONE SO, ITS ORDER OF DECEMBER 12, 1927, SUED ON HEREIN, IS VOID AND NO RECOVERY CAN BE HAD AGAINST THE YARDS COMPANY THEREON.

The report of the Commission dated June 2, 1925 (R. 147), defines the issues made before it under the complaints filed in Dockets 9977 and 12614. As is specifically stated, the complaint in Docket 9977 brought in issue only interstate shipments and was filed on November 17, 1917. (R. 148.) As we have also pointed out and as the Commission states (R. 148), the only complainant named in this complaint was the Chicago Live Stock Exchange, and while it was described as an association, none of the parties composing it were named

as complainants, either in the complaint itself or in the proof offered to support it.

At page 1926 of the record made before the Commission on May 20, 1919, in Docket 9977, (Defts.' Ex. 7, R. 269), counsel for the Chicago Live Stock Exchange was given permission to file a list of cattle raisers and shippers with the Examiner. This list was apparently filed, for in its report of June 2, 1925 (Pltfs.' Ex. 3, R. 147) the Commission says (R. 149):

> "On June 16, 1919, counsel for complainant transmitted to us, apparently without service on the defendants, 'a printed list of farmers, stock raisers, and shippers throughout the country who have made shipments to and from the Chicago market during the past two years and who have paid the charges under investigation in this proceeding.'"

This list was not introduced as an exhibit in Docket 9977, and as stated by the Commission and shown by the record, was never served upon the defendants in that case. The only knowledge the Yards Company has ever had of it is based on the Commission's mention of it, and the only description of it by the Commission is that it was a list of farmers, stock raisers and shippers. As such, it certainly did not include petitioners who were commission men. And in any event, the record does not show that it did contain the names of petitioners. The record does show, however, that it was not filed as an amendment to the complaint in Docket 9977. (R. 295.) It, therefore, follows that the only complainant in Docket 9977 was the Chicago Live Stock Exchange, which, as we have said, is a corporation.

The filing of a complaint by that corporation did not operate to make the commission men, petitioners here, complainants in Docket 9977, even though it was stated in the complaint that it was filed on behalf of the mem-

bers of the Exchange. (R. 245.) This exact question has been passed upon by the Commission itself. In the case of *Michigan Hardwood Manufacturers' Association* v. *Freight Bureau*, 27 I. C. C. 32, which was a complaint brought by a similar association, the Commission said at page 35:

> "In *Cattle Raisers' Asso.* v. *C. B. & Q. R. R. Co.* 10 I. C. C. 83, 104, the Commission said that the filing of a complaint by a voluntary association in behalf of its members, if it contained the necessary allegations and prayer for reparation, would be in effect a filing of a petition by the members of the association which would interrupt the running of the statute with respect to such members as of the date when the petition was filed. That case was decided in 1904, before the passage of the Hepburn amendment. The act then contained no provision of limitation. By the terms of the Hepburn amendment it is provided that no recovery shall be had unless the claim is filed with the Commission within two years from the time it accrues, and we have held upon further consideration, and reaffirm that holding here, that a voluntary association cannot by claiming reparation in behalf of its members interrupt the running of the statute. *Missouri & Kansas Shippers' Asso.* v. *A. T. & S. F. Ry. Co.* 13 I. C. C. 411. The preferring of such a petition is not a filing of the claim within the meaning of the act as now amended. The name of the person in whose behalf damages are sought must be stated."

The decision in *Missouri & Kansas Shippers' Association* v. *A. T. & S. F. Ry. Co.* 13 I. C. C. 411, cited in the *Michigan Hardwood Manufacturers' Association* decision, fully supports the latter decision, and there is no later case decided by the Commission holding to the contrary. In the *Missouri & Kansas Shippers' Association case*, the Commission discussed in some detail the requirements of the law with respect to the filing of complaints before it by associations such as the Chicago

Live Stock Exchange, and concluded its discussion by saying at page 414:

> "But when the prayer of a complaint by a voluntary association asks for more than the mere fixing of a just and reasonable rate for the future, in substitution of a rate alleged to be unjust, and demands damages for its members on account of previous shipments made by them under the rates attacked, nothing short of the affirmative compliance on the record with the requirements here indicated will be accepted by the Commission as sufficient to take such claims out of the limitation provided by law."

It must be conceded, therefore, that the only complainant before the Commission in Docket 9977 was the Chicago Live Stock Exchange. The members of that Exchange were not made complainants by the filing of the complaint and the farmers and shippers named in the list filed on June 16, 1919, were not made complainants by amendment or otherwise. And in any event, the parties named in the list are not plaintiffs in this suit.

It is true that the complaint in Docket 12614 (Defts.' Ex. 3, R. 257) filed February 25, 1921 (R. 149, 238) lists the commission men then members of the Chicago Live Stock Exchange, in paragraph 4 thereof. But it nowhere appears that those commission men, petitioners here, were members of the Chicago Live Stock Exchange in November, 1917, when the complaint in Docket 9977 was filed. Notwithstanding this fact, the order of the Commission herein sued on awards reparation in Docket 9977, to them and against the Yards Company. Certainly, the Commission had no jurisdiction to award reparation in Docket 9977 to persons, firms and corporations who were not legally before it as complainants and whose names the Yards Company did not then and does not now know.

The Commission has itself recognized its limitations in this respect in its decisions in the *Michigan Hardwood Case, supra,* and the *Missouri & Kansas Shippers' Association Case, supra.* Its construction of the statute in those cases is not plainly erroneous and must, therefore, be treated as conclusive. *New York, New Haven & Hartford Railroad* v. *Interstate Commerce Commission,* 200 U. S. 361, 401. In its decisions herein, the Commission makes no effort to take this case out of the application of the cases cited. It is only said in its report of June 2, 1925, (Pltfs.' Ex. 3, R. 149), that

> "Complainants and their shipments were identified by reason of the fact that none but members of the exchange were permitted to do business through the stockyards * * * where all such members were known."

This was a conclusion not supported by any evidence, and, moreover, does not show a compliance with the requirements of the law, as construed by the Commission. The only reparation, therefore, that the Commission could possibly have had jurisdiction to award to petitioners as against the Yards Company is that prayed for in Docket 12614. As we have said, that complaint was filed on February 25, 1921. (R. 149, 238.)

Section 16(3) of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 16 to end pp. 28, 29), provides that all complaints against carriers for the recovery of damages not based on overcharges, shall be filed with the Commission within two years from the time the cause of action accrues and not after. The amounts herein sued for were not overcharges, and under this section of the law, the only reparation which the Commission had any jurisdiction to award against the Yards Company was for amounts paid to it subsequent to February 25, 1919, two years prior to the filing of the com-

plaint in Docket 12614. This statutory limitation with respect to the filing of complaints asking for damages is jurisdictional.

In *Phillips* v. *Grand Trunk Railway*, 236 U. S. 662, this court held at page 667, that this particular statutory provision not only barred a recovery but destroyed the liability, whether a complaint was filed with the Commission or suit was brought in court. To the same effect is *K. C. S. Ry. Co.* v. *Wolfe*, 261 U. S. 133, 138, 139, and *Danzer* v. *G. & S. I. R. Co.* 268 U. S. 633, 636.

The law on this point is clear but the Commission erred in stating its jurisdiction under that law. In its report of June 2, 1925, it said (R. 149) that the complaint in Docket 12614 embraced all interstate shipments which moved within two years, plus the period of federal control, prior to the filing of the complaint, and intrastate shipments during federal control. We have heretofore shown that the Commission had no jurisdiction to award reparation against the Yards Company on intrastate shipments moving at any time, since it was not under federal control.

It is also true that as to the Yards Company, the two year period prescribed in Section 16 of the act was not extended by the period of federal control. Paragraphs (c) and (f) of Section 206, Transportation Act, 1920 (U. S. C. A. Title 49, Sec. 16 to end, pp. 357, 358) apply only to carriers which were under federal control. The Yards Company was never under federal control. (R. 139, 233.) The two-year limitation therefore remained effective as to claims against it.

For the reasons assigned, the Commission had no jurisdiction or authority to award reparation against the Yards Company in Docket 9977. Such a conclusion is not only supported by law, but by reason and justice.

The practice before the Commission is looser than that in courts of law, but no looseness of practice can justify the allowance of a recovery by parties who are not named in the complaint; who are not otherwise of record and whose identity is not disclosed by the record and is not known to the defendant.

The extent to which the award of the Commission is void because allowed in Docket 9977, cannot be determined from the record. The report of the Commission dated May 14, 1928 (Pltfs.' Ex. 5, R. 210) states that the record does not show the dates on which the payment of the charges assailed was made (R. 211), and such a record of payment is necessary in order to determine what part of the award might properly have been allowed in Docket 12614. The burden was upon petitioners seeking to sustain the award to make this proof. The prima facie effect of the order sued on was rebutted by the Yards Company through its showing of a lack of jurisdiction on the part of the Commission to award reparation against it in Docket 9977. It was, therefore, incumbent upon petitioners to supply the proof necessary to make a proper division, as between Dockets 9977 and 12614, of the total amount of reparation awarded by the Commission, and since they have failed to do this, no part of the award can be sustained.

This necessarily follows, as that part of the award made under Docket 9977 was made by the Commission without jurisdiction, and that jurisdiction cannot be conferred by a failure on the part of petitioners to supply necessary proof. This point was urged in the District Court (R. 302) and Court of Appeals and although not mentioned in the opinions filed by those courts, we submit, nevertheless, that it requires an affirmance of the judgment herein.

VIII.

THE COMMISSION DID NOT HAVE BEFORE IT ANY COMPETENT EVIDENCE UPON WHICH IT COULD DETERMINE THE AMOUNT OF THE REPARATION AWARDED BY IT AND THE ORDER AWARDING SUCH REPARATION IS THEREFORE VOID.

This suit is to collect the specific amounts listed in the Commission's order of December 12, 1927 (Pltfs'. Ex. 4; R. 157 *et seq.*) and therein said to be due from respondents to the individual petitioners. The only evidence which the Commission had before it and upon which it could possibly have based its order of December 12, 1927, in so far as the amount said to be due each petitioner is concerned, was an exhibit identified as Exhibit 1-A, which was offered and received in evidence on the hearing held by the Commission on October 3, 1922. (Defts.' Ex. 9; R. 270.) Exhibit 1-A before the Commission was received in evidence on the trial of this case as Defendants' Exhibit 37 (R. 283), and consists of some thousands of sheets purporting to show that detail with respect to individual shipments which the Commission had to have in order to make such an order as its order of December 12, 1927. This exhibit has been certified to this court as an original exhibit. A representative sheet is shown at page 163 of the Certified Excerpts from Original Exhibits, filed by petitioners herein.

The exhibit was initially delivered to the Commission in Docket 9977, on February 25, 1921 (R. 226), the same day the complaint in Docket 12614 was filed. At that time, it was not filed during the course of any hearing, was not accompanied by any testimony, was not filed as an exhibit, was not served upon any defendant, and was in no way identified. The testimony upon which the ex-

hibit was received in evidence by the Commission was given by Mr. Park. On the hearing of July 14, 1921 (Defts.' Ex. 8, R. 269), held after the exhibit had been deposited with the Commission the following occurred (p. 105):

"Mr. Hillyer: Have you prepared a list of shipments of live stock to the Chicago market upon which shipments the loading charges condemned in Docket 9977 was assessed?

Mr. Park: I have."

At page 108 of the same record, the following occurred:

"Mr. Hillyer: In getting this information that you placed upon those statements what record did you take it from?

Mr. Park: From the records of the Commission, firms and the Stock Yard Company."

At page 118 of the same record Mr. Park stated that the document was taken from the books of the commission men and in some instances from stockyards records, and at page 119 he said that the document was made from the waybills of the railroads and in part from other records; that it was made by him and under his supervision. Upon the trial of this case, Mr. Parks also testified that he made up a statement showing the detail of the shipments made, using the original records of the commission firms (R. 220); that the information he used in getting up the statement was secured from the bills, records and check stubs of the commission men (R. 229).

The statement thus referred to was then identified by the witness as being the one filed with the Commission on February 25, 1921 (R. 226, 227) and subsequently introduced in evidence before the Commission as Exhibit 1-A (R. 220, 221, 227). At the time of the hearing on July 14, 1921, the document in question had not been introduced in evidence upon any hearing, and the Yards Company knew nothing about it, although Mr. Park had

apparently filed it with the Commission on February 25, 1921.

Upon the basis of Mr. Park's identification of the document, as contained in his testimony on the hearing of July 14, 1921, and which we have quoted, petitioners' counsel offered it in evidence at the hearing before the Commission on October 3, 1922. (Defts.' Ex. 9, R. 270.) At pages 42 and 43 of that transcript, counsel said:

> "I offer, Mr. Examiner, as our exhibit in this hearing the complete claim statement showing every shipment under the form I have indicated here upon which the unlawful charge was paid. I offer that as part of the record in the case."

To this statement, counsel for the Yards Company replied:

> "I object to the offer on behalf of the Union Stock Yard & Transit Company as being incompletely and irrelevantly proved and there has been no sufficient identification to make the offer competent as regards that document."

The Examiner then said:

> "It will be received as Exhibit 1-A, and counsel for defendants will be allowed the opportunity to go through it item by item and call for the witnesses who have purported to have received the individual shipments for such cross-examination as is competent and relevant."

To this statement of the Examiner, counsel for the Yards Company replied:

> "These complainants are making a claim for money. The way for them to prove their case is to put their own people on the stand and prove it by competent evidence or we object to it on the ground that it is incompetent and improperly proved."

Notwithstanding these objections, the document thus identified in Mr. Park's evidence was received in evidence and marked "Exhibit 1-A." After it was received, each

witness called by complainants was interrogated with respect to it. We can best illustrate what was done by quoting from the testimony of a few of the witnesses. At page 228 of the hearing on October 3, 1932 (Defts.' Ex. 9, R. 270) witness Kennedy testified as follows:

"Q. Were the books and records of your firm turned over to Mr. Park and his assistants for the purpose of preparing your claim for reparation in this case?

A. Yes, sir.

Q. Approximately how much is your claim?

A. About $6,300."

Thereupon the witness was shown and identified a few of the shipments appearing on one of the sheets of Exhibit 1-A, and then made the statement that they were representative of all of his shipments included in that exhibit. The following then occurred at pages 239 and 240 of the transcript:

"Q. Have you made any check of Exhibit 1-A, which is on the table here, of all the shipments shown therein as arriving at the yards and consigned to your company?

A. We had Mr. Park prepare the claims from our records. Personally I have not checked it.

Q. You know nothing about the contents of this Exhibit 1-A which Mr. Park made up; you made no check of it?

A. No, sir."

At pages 243 and 244 of the same transcript, witness Sherwood testified as follows:

"Q. Were the books and records of your firm turned over to Mr. Park and his assistants for the purpose of preparing your claims for reparation in this case?

A. They were.

Q. Can you tell us approximately the amount of the claim that you have?

A. It amounts to approximately 13,500 cars that

we handled or around $3,600 or $3,700, approximately that."

The witness then identified a few shipments on one sheet of Exhibit 1-A as being representative of all shipments to his firm, and further testified at page 247 of the transcript:

"Q. Are the claim statements prepared under your authority correct to the best of your knowledge and belief in so far as they include all the shipments consigned to your company?"

To this question, respondents objected on the ground that the witness was not qualified to answer. The objection was overruled, whereupon the witness testified at page 248:

"They are."

On cross-examination, at pages 248 and 249 of the transcript, this same witness testified as follows:

"Q. What statements are you referring to when you said the claim statements were correct?

A. The statement Mr. Park fixed for us.

Q. The sheet marked Exhibit 1?

A. Exhibit A, yes.

Q. Have you checked over Exhibit 1?

A. Through Mr. Park we have.

Q. Have you done it yourself?

A. I have done part of it and we turned over the books and everything we had for the rest of it.

Q. What I am getting at is this: Is Exhibit 1-A on the table? Have you checked over these documents?

A. I sent in the data from which he made the documents.

Q. You gave him the books and he made Exhibit 1-A from the books?

A. He made Exhibit 1-A from the books, yes.

Q. You have not checked over Exhibit 1-A subsequently to ascertain whether it correctly shows what your books show?

A. No."

The foregoing is representative of the testimony offered on this point by each witness produced by petitioners. Practically every witness testified as to the approximate amount of his claim, and over objection was then permitted to testify that the amount of his claim was correctly shown in Exhibit 1-A, prepared by Mr. Park. The testimony of Mr. Park, which we have quoted, and the statements of the witnesses, of which we have quoted representative examples, constitute all the evidence which was offered by petitioners to qualify the exhibit as evidence in the case.

We submit that under the facts of record, Exhibit 1-A (Defts.' Ex. 37 in this court) should not have been received in evidence by the Commission. It affirmatively appears that the exhibit was made by Mr. Park or his assistants from certain other records which he had secured from the commission men, from the railroads, and perhaps from the Yards Company. There was no testimony whatsoever with respect to the records used as a basis for the exhibit. In fact, all the records used were not even identified, beyond the statement that they were records. The people who helped Mr. Park make the exhibit up are not identified beyond the statement that they were his assistants. It does not appear whether the exhibit was a copy of the records used or was a compilation made from them. None of the original records were produced or identified by any witness nor was there any evidence whatsoever with respect to them. While each witness did undertake to testify that the exhibit was correct, it affirmatively appeared from their cross-examination that none of them had examined it or knew anything about it. For these reasons, respondents objected to the receipt of the exhibit in evidence by the Commission and also objected to the testimony of each

witness with respect thereto. Its receipt in evidence and use in making the order of December 12, 1927, was a flagrant disregard of respondents' rights and makes the order void.

In *Spiller* v. *A. T. & S. F. Ry.* 253 U. S. 117, a substantially similar question was presented. In that case also, there was introduced in evidence before the Commission a summary of shipments based upon the records of the commission merchants and which was used by the Commission as a basis for the award subsequently made. At page 130 this court said:

> "The evidence was not objected to as hearsay when introduced, nor, indeed, at any time during the hearing before the Commission."

In this case, at the time Exhibit 1-A was offered in evidence, the Yards Company strenuously objected to it on the ground that it had not been sufficiently proven and was incompetent and hearsay. Moreover, the same objection was made to the testimony of every witness who undertook to qualify it as being a correct statement of fact. In the *Spiller Case,* the summaries in question had also been submitted to the carriers for investigation and were verified and approved by them. With respect to this feature of the matter, this court said at page 128:

> "No reparation was awarded by the Commission except with respect to such shipments as were acknowledged in the reports of the defendants to have moved as stated."

That is not true in this case. On the contrary, the report of the Commission, dated May 14, 1928 (Pltfs.' Ex. 5, R. 210) and the order accompanying it, shows definitely that the Yards Company never did verify or approve any statements submitted by petitioners. Moreover, upon the trial of the *Spiller Case* in the lower court, the entire record before the Commission was not pro-

duced. With respect to this feature of the case, this court said at page 125 of its opinion:

> "But obviously we hardly could sustain a decision rejecting the reparation order upon the ground that there was not sufficient evidence before the Commission to support it when the whole of the evidence that was before the Commission was not produced."

In the case at bar, the entire record before the Commission was produced in court, including the Exhibit 1-A which we are discussing. This is conceded by petitioners and is shown to be so by the stipulation introduced as Defendants' Exhibit 1 (R. 243), when considered in connection with the other exhibits offered. It thus appears that none of the reasons which existed in the *Spiller Case, supra,* for receiving the statement in question exist here. In speaking of the right of the Commission to receive evidence of this character, this court said in the *Spiller Case,* at page 126 of its opinion, referring to the provisions of the Act to Regulate Commerce:

> "These provisions allow a large degree of latitude in the investigation of claims for reparation, and the resulting findings and order of the Commission may not be rejected as evidence because of any errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence."

Certainly, it will not be denied that the ascertainment by the Commission of the exact amount due to each petitioner was an essential fact necessary for the Commission to determine. Nor can it be denied that under the foregoing language, this fact with respect to each petitioner had to be based upon substantial evidence. Respondents were certainly entitled to know through competent evidence how much was claimed from them by each petitioner. The receipt of some incompetent evidence on this subject would not vitiate the award, pro-

vided that there was sufficient good evidence upon which the award could be based. Necessarily, however, there had to be sufficient good evidence to justify an order.

The only proof on the question of the amount claimed by each petitioner is contained in Exhibit 1-A. At no other place in the record is there any evidence upon which the Commission could possibly have based the order here sued on. It is the only evidence offered which purports to show the detail contained in the order of December 12, 1927. Each witness for petitioners did state the approximate amount of his claim, but referred to the exhibit for a statement of the exact amount.

From the foregoing, it results that the receipt of this exhibit in evidence by the Commission and its subsequent use in making the order of December 12, 1927, denied a fair hearing to respondents and amounted to a denial of due process. Certainly, defendants have some rights in proceedings before the Commission. Respondents had the right in this case to know how much was claimed from them by each petitioner and they were entitled to have this fact shown by competent testimony given by a qualified witness. Such testimony, however, was not forthcoming.

We submit that the objections made in the proceedings before the Commission to the receipt in evidence of Exhibit 1-A and the objections to the testimony of the witnesses who testified with respect thereto, should have been sustained, and that the exhibit itself should not have been received in evidence. It results that the order of the Commission herein sued on, being necessarily based upon Exhibit 1-A, cannot be sustained. This point was urged in the District Court and Circuit Court of Appeals, and while not referred to in the opinions of those courts, we submit that it requires an affirmance of the judgment herein.

IX.

THE REPARATION AWARD HERE SUED ON IS VOID BECAUSE THE COMMISSION, IN MAKING IT, CONSIDERED EVIDENCE NOT IN THE RECORD BEFORE IT.

In its report of May 14, 1928 (Pltfs.' Ex. 5, R. 211) the Commission refers to the fact that respondents refused to verify the statements submitted to them by petitioners under Rule V of the Commission's Rules of Practice (Defts.' Ex. 45, R. 291). It is then said (R. 211) that petitioners filed statements with the Commission containing the essential information called for by Rule V of the Rules of Practice, some of which statements were verified by the defendant carriers; that tabulated statements and summaries were filed with the Commission showing the amounts of reparation due each petitioner and that after these summaries were checked upon the record, its order of December 12, 1927 was issued.

As we have pointed out, the entire record made before the Commission in the hearings held by it was introduced in the trial court and is now before this court. Nowhere in this record appear the "statements", "tabulated statements" or "summaries" referred to by the Commission in its report of May 14th. It is certain that these statements and summaries were submitted to the Commission after the last hearing held by it, since it appears from the Commission's report of May 14, 1928 (R. 211) that they were filed with it subsequent to its report of June 2, 1925 (Pltfs.' Ex. 3, R. 147 *et seq.*) and the last hearings were held by the Commission in February, 1923 (Par. 40, Defts.' Ex. 1; R. 239, 243). Obviously then, the Commission in getting up its order of December 12, 1927 (Pltfs.' Ex. 4, R. 157 *et seq.*), the reparation order

sued on herein, considered evidence which could not have been in the record. Under these circumstances, the order of December 12, 1927 is void.

This precise question was passed upon by this court in *United States, et al.* v. *A. & S. Ry. Co. et al.* 265 U. S. 274. In that case the finding of the Commission rested in part upon data taken from the annual reports filed with the Commission by the railroads, but which reports were not formally put in evidence. This court said at page 287:

> "The parts of the annual reports in question were used as evidence of facts which it was deemed necessary to prove, not as a means of verifying facts of which the Commission, like a court, takes judicial notice."

And on page 288 this court said:

> "But a finding without evidence is beyond the power of the Commission. Papers in the Commission's files are not always evidence in a case. *New England Divisions Case,* 261 U. S. 184, 198, note 19. Nothing can be treated as evidence which is not introduced as such. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.* 227 U. S. 88, 91, 93; *Chicago Junction Case,* 264 U. S. 258."

At page 290, this court concluded its discussion of the matter by saying:

> "The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void."

To the same effect are the decisions in *I. C. C.* v. *L. & N. Ry.* 227 U. S. 88, 91, 92; *Chicago Junction Case,* 264 U. S. 258, 263, and *C. R. I. & P. Ry.* v. *U. S.* 274 U. S. 29, 33.

It is plain that the statements and summaries referred to by the Commission in its report of May 14, 1928

(Pltfs.' Ex. 5, R. 210 *et seq.*) were used as evidence of facts which it was necessary to prove, for that report of the Commission states that after they had been checked upon the record, it issued its order of December 12, 1927. Moreover, no one could deny that proof of the amounts due each petitioner was an essential element of petitioners' case.

Nor does the statement in the Commission's report of May 14, 1928, that the summaries were "checked upon the record" affect the legal proposition. The only part of the record with which these summaries could possibly have been checked is the Exhibit 1-A offered by petitioners upon the hearing of October 3, 1922, and which, as we have heretofore shown, was improperly received in evidence. The checking of statements which were not in the record, with an exhibit that should not have been in the record, affords no legal foundation for the use of those statements as the basis for the issuance of an order.

Respondents were entitled to know upon what the Commission based its order. It was their right to have petitioners introduce all evidence which was to be given consideration in the case, in open hearing with notice to them. The requirements of the law are certainly not satisfied by the submission to the Commission, after the record has been closed, of statements and summaries which, as appears from the Commission's own reports, were used as a basis for issuing the award sued upon. Upon no theory of the law can an award of reparation founded upon such a basis be sustained. This point was urged in the District Court and Circuit Court of Appeals, and while not mentioned in the opinions of those courts, it nevertheless requires an affirmance of the judgment.

Conclusion.

In concluding their brief, petitioners suggest a reversal of the judgment herein because of the time and money that has been spent by petitioners in prosecuting this claim. No mention is made of the money which the Yards Company has been required to spend and of the work which it has been required to do in retaining charges which were lawful when collected, have never been declared to be unlawful and which the Yards Company has every right to retain. It is reasonably certain that the Yards Company has spent as much money and effort in trying to keep what belongs to it as petitioners have spent in trying to get something to which they are not entitled.

There is nothing technical in the grounds upon which the District Court and the Circuit Court of Appeals decided the case contrary to petitioners' contentions. The decisions of those courts went directly to the root of the whole case. It is difficult to imagine more fundamental objections to a claim for damages than those upheld by both lower courts. The uncontroverted facts in this case, so far as the Yards Company is concerned, are that it collected only amounts which it not only had a right to collect but was required to collect under the theory of the Commission itself in order to avoid incurring a criminal liability. If it is now required to refund any part of those charges, it will be required to give up something to which it has a valid right. It will be put in the position of being required to perform what the Commission says is a transportation service, for less than its lawful tariffs authorize and require it to collect.

As we read petitioners' brief, its claim against the Yards Company is based entirely upon the allegation

that the Yards Company connived with the Director General in the collection of alleged unlawful charges from petitioners. That this argument is not good results from the facts that the charges were not collected from petitioners and that they were not unlawful. Petitioners have advanced no arguments which justify the conclusion that the Yards Company should sustain a loss in order that petitioners may profit by the payment to them of compensation for an injury which they have not sustained.

We submit that the judgment should be affirmed.

Respectfully submitted,

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No. 581

In the Supreme Court of the United States

OCTOBER TERM, 1931

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN ET AL., PETITIONERS

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY, RESPONDENTS

BRIEF FOR INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

E. M. REIDY,
For Interstate Commerce Commission.

DANIEL W. KNOWLTON,
Of Counsel.

JANUARY 19, 1932.

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS Trading as Adams & Kitchen et al., petitioners

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, and Union Stock Yard & Transit Company, respondents

BRIEF FOR INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to leave of court obtained, the Interstate Commerce Commission, hereinafter called the Commission, submits this brief in support of the petition for writ of certiorari herein.

The decision of the Circuit Court of Appeals for the Seventh Circuit, review of which is sought by this petition, is reported in 51 Fed. (2d) 620, under the title of *Adams & Kitchen et al.* v. *Mellon, Director General.* (R. 389.) It affirmed a judgment

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of the United States District Court for the Northern District of Illinois, Eastern Division (39 Fed. (2d) 80), which rejected an award of reparation made by the Commission (R. 147) (100 I. C. C. 266).

The filing of this brief is prompted by the importance to the railroads, shippers, and the Commission of the question presented, namely, the right of petitioners, commission merchants doing business in the Union Stock Yards in Chicago, in "their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers and also as factors and agents for and on behalf of the livestock shippers who were the consignors" (R. 151), to bring suit upon the award. Other cases are now pending before the Commission, the disposition of which would be governed by the case at bar. We believe the question to be an important one of federal law affecting the Commission's administration of the Interstate Commerce Act and the rights of interstate shippers and carriers generally.

FACTS

This proceeding is an outgrowth of the Commission's order of December 12, 1927, in Docket No. 9777, *Chicago Live Stock Exchange* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 100 I. C. C. 266, in which the Commission held petitioners to be entitled to reparation from the Director General and

the Union Stock Yard & Transit Company, aggregating $140,001.25, plus interest, upon the following findings:

> * * * we find that the collection of separate charges from complainants and interveners for the service of unloading and loading interstate shipments of ordinary livestock at the Chicago stockyards, in addition to the line-haul rates on such livestock, during the reparation period hereinbefore defined, and intrastate shipments during the period of Federal control, was an unlawful and unreasonable practice.
>
> We further find that the following parties of record, either as interveners or complainants other than members of the exchange, have established by competent testimony that they both paid and bore the charges herein found unlawful and unreasonable, and that they have been damaged in the amount of such charges and are entitled to reparation with interest from the date of such payment: * * *
>
> Most of the reparation claimed is by the livestock commission merchants, members of the exchange, covering amounts collected from them for the unloading service at the stockyards. They seek reimbursement in their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers and also as factors and agents for and on behalf of the livestock shippers who were the consignors. While it is admitted that in each

and every instance the charge which was paid by the commission merchant was subsequently charged back and collected from the consignors, this would not affect the right of the complainant consignees to awards of reparation. There is a direct and well-established relation between the complaining members of the exchange and their shippers by which the former are fully authorized to present these claims and seek awards of reparation in their own names as factors and agents for such shippers. The commission merchant at the stockyards not only disposes of the shipper's stock at the market and at such price as he deems best, but is his agent in the payment of freight and related charges, such as feeding, etc., and in the filing of claims for overcharge and for loss and damage to the stock in transit. Defendants have frequently recognized this relationship by settling loss and damage claims with the commission merchants. The right of factors in their representative capacity to recover reparation in their own names for unlawful and unreasonable charges is settled. *Memphis Freight Bureau* v. *St. L. & S. F. R. R. Co.*, 57 I. C. C. 212.

We find that the following individuals, copartnerships, and corporations, parties of record, made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to

reparation, as factors and agents for the shippers, with interest from date of payment: (Naming such parties) (R. 150–152).

On respondents' failure to pay the award, this suit was brought by petitioners herein, 103 commission merchants, members of the Chicago Live Stock Exchange. The District Judge instructed the jury to bring in a verdict for respondents, and in his written opinion held that the petitioners had no such legal interest in the proceeding as entitled them to maintain the action; that it was the farmer, shipper and producer of the livestock whose money was illegally retained by the carrier, and that the suit should be brought by the farmer, producer and shipper instead of by the commission men, petitioners herein. (R. 73.) In its opinion the District Court pointed out that the order of the Commission in this case was based upon its prior holding in the case of *Missouri Portland Cement Co.* v. *Director General,* 88 I. C. C. 492, and that the Commission's decision in the *Missouri Portland Cement Company Case* was based in turn upon its interpretation of this court's opinion in the case of *Southern Pacific Co.* v. *Darnell-Taenzer Co.,* 245 U. S. 531. (R. 68.)

Upon appeal, the Circuit Court of Appeals, although affirming the decision of the District Court, said that its "examination of this question does not so entirely satisfy us of the correctness of the District Court's conclusion thereon as to justify our

deciding the appeal upon ground so formal and technical, if a proper result may be reached upon the merits of the cause" (51 Fed. (2d) 620, 623) (R. 394).

The basis of the decision of the Circuit Court of Appeals was this: In about 1894, the Stock Yard Company published a tariff with the Commission fixing a charge of 50 cents for loading and 25 cents for unloading each car of livestock. These charges were absorbed by the line-haul carriers in their duly published tariffs. In 1917, the Stock Yard Company filed a tariff increasing these charges 25 cents per car, or to 75 and 50 cents, respectively. The railroads did not amend their tariffs so as to absorb the additional charge of 25 cents per car, and this additional charge was indorsed on the freight bills, paid by the commission merchants in the stockyards—to whom the shipments were consigned—and ultimately received by respondent Union Stock Yard and Transit Company. (R. 390.) During Federal control, the Director General likewise declined to absorb the 25 cents per car increase, which continued to be paid and collected as before Federal control. (R. 390.) The Circuit Court of Appeals then said:

> The absorption by the line-haul carriers of the originally filed rate of 50 cents and 25 cents for loading and unloading cars was not a gratuity on the part of the carriers. The comprehensive operations of the Stock Yard Co. greatly facilitated the handling of

stock at Chicago for all the line-haul carriers. It undertook the service of rapidly unloading the cars coming into that great market. Its facilities made possible that elasticity of service which tended continuously to speed the unloading of live stock, regardless of variations in daily deliveries by the several carriers, and promptly to release the rolling stock for further movement.

Under the law, the entire transportation service must be rendered at a reasonable rate, and the absorption of this loading and unloading charge was in fact a promulgation by the line-haul carriers of such a rate for the entire service as was then deemed reasonable. The result to the shipper would have been the same had the line-haul carriers correspondingly reduced their rates, and not absorbed the loading and unloading charges.

In our judgment this absorption extended only to the amounts specifically named in the absorption clause; and, when the Stock Yard Co. promulgated its 25 cents increase, not only did the original absorption not include this increase, but the line-haul carriers definitely refused to absorb it; and when the carriers passed into federal control the refusal to absorb was persisted in. But this left it none the less the lawful duty of the Stock Yard Co. to collect the increased charge of 25 cents upon each car, and failure to collect would have subjected that company to the penalties which the law prescribes. (R. 395–396.)

In holding that the Stock Yard Company was not a tort-feasor in the collection of the charges assessed, the Court said:

> Appellants earnestly urge that the collection of this charge was a tort, and that all participants therein were joint tort-feasors. We can not believe that the Stock Yard Co. committed a tortious act in collecting and receiving its tariff charge, the failure to collect and receive which would have been a breach of its statutory duty. Nor do we understand how the Director General of Railroads became a tort-feasor through his continuing the prior practice of receiving from the Stock Yard Co. the entire rate, including the additional loading and unloading charges, and then turning back to the Stock Yard Co. that part of the total charge to which it was entitled. Particularly is this so when there is no pretense that either the charge itself or the entire rate including this charge was excessive. But even if technically to be considered a tort, under all the circumstances, so far as the record discloses, it was at most *damnum absque injuria*. (R. 399.)

It will be noted that the Circuit Court of Appeals held also that the Commission's finding that the collection of the increase of 25 cents per car was "an unlawful and unreasonable practice" was not a finding that it was an unreasonable rate. (R. 397.) While on this point the Commission feels

that reparation may be awarded on any violation of the Act subjecting complainants to damage, whether it relates to rate, fare, charge, classification, regulation or practice, (Section 15) it thinks best to call the court's attention to the fact, as shown in its findings quoted at pages 3 and 4 of this brief, that the Commission found the parties named therein who "paid and bore the charges herein found unlawful and unreasonable" (R. 150) to be entitled to reparation. In another portion of its report it also spoke of these charges, having been "heretofore found to have been unreasonable and unlawful." (R. 151.)

Of concern to the Commission is the question of the standing of these petitioners to sue for reparation. It is our understanding that this question would customarily be the one passed upon by this court before proceeding to a determination of the merits. As stated, the District Court's opinion shows that the Commission's order herein was based upon its *Missouri Portland Cement* decision (88 I. C. C. 492), which in turn follows its interpretation of this court's opinion in the *Darnell-Taenzer Case, supra.* In that case, in passing upon facts in our opinion analogous to the facts herein, this court said:

> The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the dam-

age that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. *Olds* v. *Mapes-Reeve Construction Co.,* 177 Massachusetts, 41, 44. Perhaps strictly the securing of such an indemnity as the present might be regarded as not differing in principle from the recovery of insurance, as *res inter alios,* with which the defendants were not concerned. If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. *State* v. *Central Vermont Ry. Co.,* 81 Vermont, 459. See *Nicola, Stone & Myers Co.* v. *Louisville & Nashville R. R. Co.,* 14 I. C. C. 199, 207–209. *Baker Manufacturing Co.* v. *Chicago & North Western Ry. Co.,* 21 I. C. C. 605. The carrier ought not to be allowed to retain his

> illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. *New York, New Haven & Hartford R. R. Co.* v. *Ballou & Wright*, 242 Fed. Rep. 862. Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. (13 I. C. C. 680.) Probably in the end the public pays the damages in most cases of compensated torts.

In the *Missouri Portland Cement Case, supra,* the Commission, speaking through Mr. Commissioner Eastman, and after quoting from the Darnell-Taenzer decision, said:

> Two things are clear. One is that the fact that complainant suffered no ultimate damage is not of controlling importance. In the *Darnell-Taenzer case* plaintiffs transferred the damage to the consumer through the selling price of the lumber. Here complainant transferred it to the consignees through separate invoices, and doubtless it finally reached the consumer. As the Supreme Court states in the *Darnell-Taenzer case:* "Probably in the end the public pays the damages in most cases of compensated torts." The court has made proximate rather than ultimate damage the test, and has said that proximately the losses accrue when the charges are paid. The question,

> then, is whether in this case complainant "paid" the charges within the meaning of the court. This leads directly to the second point which is clear, and that is that the consignees from whom complainant collected the charges by separate invoices paid the charges and could have maintained an action for recovery, for in the *Darnell-Taenzer case* the charges were paid by the plaintiffs in a similar manner. That is to say, payment was not direct to the railroad but through a third party. Conceding that here the consignees bore and "paid" the freight charges as such, did the complainant also pay within the meaning of the Court? (Id. 495.)

Answering the question asked in the last quotation, the Commission said:

> In this case not only did the consignees, the undisclosed principals, make no objection to the action brought by complainant, their agent, but the record shows that one of them at least was represented at the hearing and wholly aware of the nature of the proceeding. The conclusion follows that under the circumstances of the case complainant had a right to bring the action. The consignees also had such a right and, if they had exercised it, they would have been substituted for complainant, but they did not exercise it. Doubtless, also, they will have a right to recover from complainant any reparation that he may be awarded with respect to the 71 carloads, the freight charges

> upon which they bore as such. It is not necessary for us to go beyond the "first step," and under the circumstances of this case the first step was taken by complainant when it paid the freight charges. (Id. 496.)

The doctrine enunciated in the *Missouri Portland Cement Company Case* has been followed by the Commission in a great many cases. In fact in its opinion in the case now under review the District Court said:

> If, on the other hand, it [this case] is to be decided in accordance with the holding of the commission in the *Missouri Portland Cement Company case,* and forty or fifty similar holdings since the decision in that case, then the plaintiffs are the proper parties to maintain this suit. (R. 69.)

Although the Circuit Court of Appeals did not pass upon the question the Commission is particularly interested in, namely, the right of the petitioners to recover reparation before the Commission, it is believed that the decision of the District Court, as affirmed by the Circuit Court of Appeals, leaves in doubt an important question of Federal law, the final determination of which is essential to the proper performance of the Commission's administrative functions. The determination of the question as to the right of a number of individual shippers, whose separate claims may be insignificant but which, as here, aggregate a considerable sum, to present their claims for reparation through the medium of an association, is an

added reason why the writ prayed should be granted.

Respectfully submitted.

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No. 581

In the Supreme Court of the United States

OCTOBER TERM, 1931

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS, TRADING AS ADAMS & KITCHEN, ET AL., PETITIONERS

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

INDEX

	Page
INTRODUCTORY STATEMENT	1
STATUTES INVOLVED	8
ARGUMENT	9
Petitioners, as parties to the transportation transactions, who paid the charges to the defendant carriers, were entitled to maintain proceedings to recover reparation in their own names and right and as factors and agents for the consignors	9
CONCLUSION	36

TABLE OF CASES CITED

American Smelting & Ref. Co. v. *Director General*, 144 I. C. C. 570	23
Burgess v. *Transcontinental Freight Bureau*, 13 I. C. C. 668	26
California Fruit Exchange v. *Am. Ry. Ex. Co.*, 155 I. C. C. 105	32
Darnell-Taenzer Case, 245 U. S. 531	3, 9, 18
Dolese Bros. Co. v. *A., T. & S. F.*, 89 I. C. C. 110	34
Doughty-McDonald Grocery Co. v. *A., T. & S. F.*, 155 I. C. C. 47	30, 34
Jennison Bros. & Co. v. *C. & N. W. Ry.*, 158 N. W. 398	22, 34
Joyce-Watkins Co. v. *Walsh Tie Co.*, 236 S. W. 1105	34
Louis. & Nash. R. R. v. *Central Iron Co.*, 265 U. S. 59	24
Louis. & Nash. R. R. v. *Sloss-Sheffield Co.*, 269 U. S. 217	9, 11
Memphis Freight Bureau v. *St. L. S. F. R. R. Co.*, 57 I. C. C. 212	22
Missouri Portland Cement Co. v. *Director General*, 88 I. C. C. 492	3, 16, 30
New York Cent. R. R. v. *York & Whitney Co.*, 256 U. S. 406	12, 24
Parsons v. *C. & N. W. Ry. Co.*, 167 U. S. 447	24
Pitts. C. C. & St. L. Ry. v. *Fink*, 250 U. S. 577	24
Railway Mail Pay Case, 279 U. S. 73	14
Sloss-Sheffield Case, 269 U. S. 217	9, 11
Sloss-Sheffield Steel & Iron Co. v. *L. & N. R. R.*, 51 I. C. C. 635	9
Southern Pacific Co. v. *Darnell-Taenzer Co.*, 245 U. S. 531	3, 9, 18
Spiller v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117	25
Texas Livestock Shippers League v. *Director General*, 139 I. C. C. 448	22
United States v. *N. Y. Cent.*, 279 U. S. 73	14
York & Whitney Case, 256 U. S. 406	12, 24

STATUTES

	Page
Interstate Commerce Act, U. S. Code, Title 49:	
Section 1 (6)	5
Section 8	18, 24
Section 15 (5)	6
Section 16 (1)	5, 18, 24
Section 16 (2)	2
Federal Control Act, c. 25, 40 Stat. 451, 456–457: Section 10	5
Transportation Act, 1920, c. 91, 41 Stat. 456, 462: Section 206 (c)	5

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS, trading as Adams & Kitchen, et al., petitioners

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, and Union Stock Yard & Transit Company, respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

INTRODUCTORY STATEMENT

This brief, filed as amicus curiae with the permission of the court, will deal solely with the question of law decided favorably to petitioners by the Commission and adversely to them by the District Court, namely, the right of petitioners, commission merchants doing business in the Union Stockyards

in Chicago, to recover reparation in their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers, and also as factors and agents for and on behalf of the livestock shippers who were the consignors.

The District Court held that the petitioners had no such interest in the claims for reparation as entitled them to maintain suit thereon under section 16 (2) of the Interstate Commerce Act, because after selling the live stock consigned to them and collecting the proceeds of the sale, they remitted the net amount realized to the consignors or shippers, deducting all transportation charges, including the extra charge of 25 cents per car for unloading which the Commission found should not have been collected, and that, therefore, petitioners had suffered no damage. On this ground alone, the Court directed a verdict in favor of respondents. (R. 60) *Adams & Kitchen et al.* v. *Mellon,* 39 Fed. (2d) 80.

The Circuit Court of Appeals, not so entirely satisfied of the correctness of the District Court's conclusion upon this question as to justify its "deciding the appeal upon ground so formal and technical, if a proper result may be reached upon the merits of the cause," affirmed the judgment of the lower court on the merits, without definitely deciding the question of the right of petitioners to maintain the suit, although the wording of its

opinion gives the impression it inclined toward the view of the lower court. (R. 389, 51 Fed. (2d) 620.)

The question decided by the District Court is an important one, arises frequently in cases brought before the Commission and it is the Commission's interest in that question which led it to seek permission to file a brief herein, upon the assumption that the Court would deem it appropriate or necessary to decide that question, perhaps as the primary question in the case to be disposed of before considering the merits.[1]

The proceeding before the Commission related to the matter of charges for loading and unloading shipments of livestock at the Chicago union stockyards. This service was performed by the Stock Yard Company and for many years its charges therefor were absorbed by the railroads which transported the livestock to or from Chicago. Their line-haul rates included this service and no extra charge was collected from the shippers. On May 21, 1917, the Stock Yard Company increased its loading and unloading charges by 25 cents per car,

[1] The fact that the Commission has recommended to Congress that its duties in respect of reparation be restricted does not seem to be relevant here. (See 1931 Annual Report, pages 93–94; 1930 Annual Report, pages 90–93, under the heading "Reparation." In the 1930 report there is a discussion of the decision of this Court in the *Darnell-Taenzer case* and of the Commission's decision in the *Missouri-Portland Cement case*, and of the conflicting opinions of the Federal district courts on the question.)

i. e., from 25 and 50 cents to 50 and 75 cents, respectively. The line-haul carriers refused to increase their absorptions, with the result that the extra amount of 25 cents per car was collected from the consignors or consignees.

After full hearing and regular procedure, the Commission found that for more than fifty years carriers delivering live stock at the Chicago yards had loaded and unloaded the cars and made no charge extra therefor; that more than 4,000 cars of livestock are frequently delivered at the stockyards in Chicago on a single day; that if the consignees or shippers undertook to unload their inbound shipments, or to load outbound shipments, there would result such confusion and congestion at the stockyards as seriously to interfere with orderly and prompt performance of the service; that under the regulations of the Stock Yard Company no shipper is permitted to perform the service, even if he should demand the right to do so; that for years the line-haul rates to Chicago, plus a charge of $2.00 per car for terminal or switching service, had constituted the through charge and included delivery of livestock to the consignee at the stockyards; that it is not the duty of the shipper to load and unload livestock in the stockyards at Chicago but that the duty to perform this service is upon the carriers; that the services of loading and unloading livestock are part of the transportation; and that the collection of separate charges for loading or

unloading in addition to the line-haul rates was an unlawful and unreasonable practice.[2] The Commission further found that reparation should be awarded for all such extra loading and unloading charges. (R. 144, 146.)

The practice of collecting a separate charge for loading and unloading in addition to the line-haul

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[2] Unreasonable practices are prohibited by Section 1 (6) of the Interstate Commerce Act, and during the period of Federal control were prohibited and made unlawful by Section 10 of the Federal Control Act. (40 Stat. 451, 456–457.) Section 16 (1) authorizes the Commission to award reparation for any violation of the Act, including unreasonable practices, and Section 206 (c), Transportation Act, 1920 (41 Stat. 456, 461–462), gave the Commission jurisdiction to hear and determine, in the manner provided by the Interstate Commerce Act complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial or otherwise in violation of the Interstate Commerce Act.

The opinion of the Circuit Court of Appeals seemed to lose sight of the fact that it is within the statutory power of the Commission to award reparation for any violation of the Interstate Commerce Act, including violation of section 1 (6) prohibiting unreasonable practices (also, as to the period of Federal Control, section 10 of the Federal control act, prohibiting unreasonable practices). Its opinion, it seems to us, either determines initially an administrative question or substitutes its judgment for the judgment of the Commission upon an administrative question, thus disregarding repeated decisions of this Court holding that it is not within the jurisdiction of the courts to exercise administrative functions either initially or upon review.

rate came to an end on February 28, 1920, the effective date of Transportation Act, 1920, which amended Section 15 of the Interstate Commerce Act by adding paragraph (5) thereto, which specifically prohibits such practice.

Upon the passage of the amended act the line-haul carriers provided for the absorption of the full amounts of the loading and unloading charges and thereafter made no attempt to collect any part of these charges from the public. (R. 143–144.)

For this reason no order by the Commission for the future was necessary, and its reparation order covered shipments which moved during the period from May 21, 1917, the date of the increase of 25 cents per car in the loading and unloading charges, to February 28, 1920, the effective date of Transportation Act, 1920.

The reasonableness of the innumerable line-haul rates to and from Chicago was not in issue and the Commission made no finding in respect thereto. Nor did the Commission find it necessary to pass upon the reasonableness of the separate charges of the Stock Yard Company for loading and unloading, in view of its finding that those services were included in the transportation of livestock and no extra charge could be made therefor. Nor did the Commission find that the apprehensions of the line-haul carriers that the Stock Yard Company might make any charge it pleased, which the line-haul carriers would be required to pay, were well founded for the reason that—

> Upon their complaint or upon the complaint of any party, we can examine any of the charges that make up the sum of the through charges, and may prescribe just and reasonable rates for all carriers concerned, either by prescribing through routes and joint rates and the divisions thereof or otherwise, as the facts may warrant. (R. 145.)

The Commission's reparation order, dated December 12, 1927 (R. 157–208), awarded reparation to other complainants than petitioners and against other defendants than the respondents herein, but such other awards are not here involved. This suit relates only to the reparation awarded petitioners, all of whom are commission merchants, members of the Chicago Live Stock Exchange, on inbound shipments which moved during Federal control—December 28, 1917, to February 28, 1920.

It is undisputed that the petitioners were the consignees of all the shipments in question and that they paid to the carriers all transportation charges, including the extra unloading charge of 25 cents per car. It is also undisputed that in each and every instance the transportation charges which were paid by the petitioners were later charged back and collected from the consignors.

The Commission held, however, that "this would not affect the right of the complainant consignees [petitioners] to awards of reparation," and in this connection said:

> * * * There is a direct and well-established relation between the complaining

members of the exchange and their shippers by which the former are fully authorized to present these claims and seek awards of reparation in their own names as factors and agents for such shippers. The commission merchant at the stockyards not only disposes of the shipper's stock at the market and at such price as he deems best, but is his agent in the payment of freight and related charges, such as feeding, etc., and in the filing of claims for overcharge and for loss and damage to the stock in transit. Defendants have frequently recognized this relationship by settling loss and damage claims with the commission merchants. The right of factors in their representative capacity to recover reparation in their own names for unlawful and unreasonable charges is settled. *Memphis Freight Bureau* v. *St. L. & S. F. R. R. Co.*, 57 I. C. C. 212 (100 I. C. C. 269–270; R. 151.)

The Commission found that the petitioners "made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to reparation, as factors and agents for the shippers. * * *" (100 I. C. C. 270; R. 151–152.)

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, the Federal Control Act, and Transpor-

tation Act, 1920, are set forth in the appendix, following page 36.

ARGUMENT

Petitioners, as parties to the transportation transactions, who paid the charges to the defendant carriers, were entitled to maintain proceedings to recover reparation in their own names and right and as factors and agents for the consignors

The principal objection urged to the right of petitioners to recover the reparation awarded to them by the Commission was that in remitting to the shippers, petitioners deducted all transportation charges and therefore petitioners were not damaged. This contention, it seems, is answered by the decisions in *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, and *Louis. & Nash. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217.[3]

In the *Darnell-Taenzer Case*, the Court, speaking through Mr. Justice Holmes, said:

> The only question before use is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in

[3] A report of the Commission in that case, *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R. R. Co.*, 51 I. C. C. 635, contains an interesting discussion of the circumstances under which the Commission will award or decline to award reparation.

regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. *Olds* v. *Mapes-Reeve Construction Co.*, 177 Massachusetts, 41, 44. Perhaps strictly the securing of such an indemnity as the present might be regarded as not differing in principle from the recovery of insurance, as *res inter alios,* with which the defendants were not concerned. If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. *State* v. *Central Vermont Ry. Co.*, 81 Vermont, 459. See *Nicola Stone & Myers Co.* v. *Louisville & Nashville R. R. Co.*, 14 I. C. C. 199, 207–209. *Baker Manufacturing Co.* v. *Chicago & North Western Ry Co.*, 21 I. C. C. 605. The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. *New York, New Haven & Hartford R. R. Co.* v. *Ballou & Wright*, 242 Fed. Rep. 862. Behind the technical

mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. 13 I. C. C. 680. Probably in the end the public pays the damages in most cases of compensated torts.

The cases like *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations. But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss. See *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 429. *Mills* v. *Lehigh Valley R. R. Co.*, 238 U. S. 473. (*Ibid.*, 533–535.)

In the *Sloss-Sheffield case*, a similar objection was made, namely, that the steel company could not recover because it was not damaged by the excessive freight charges. Mr. Justice Brandeis in discussing this contention said—

> The carrier concedes, as it must under *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, that a recovery for excessive freight charges can be had under section 1 without specific proof of pecuniary loss, and that the measure of damages is the amount of the excess exacted.

And in concluding the discussion the Justice said:

> The carrier did not know of the provision in the sales contracts. With the rights or equities as between seller and purchaser it had and has no concern, nor need we concern ourselves with them. (269 U. S., at p. 238.)

It is to be observed that had the carriers collected from the petitioners less than their applicable tariff rates, or had failed to collect the extra 25-cent unloading charge, the carriers could have sued the petitioners at any time within the three-year period of limitation for the undercharge, *and the petitioners would have been liable.*

The liability of commission merchants for undercharges was settled by *N. Y. Cent. R. R.* v. *York and Whitney Co.*, 256 U. S. 406. In that case "the railroad company as terminal carrier sued York and Whitney Company, a commission merchant, to recover the balance claimed for freight and refrigeration on 9 carloads of melons, vegetables and fruit consigned to the latter, subject to lawful charges, and delivered at Boston during the years 1911 and 1912." (*Ibid.* 407.) "When York and Whitney Company accepted the cars it paid all charges claimed. The merchandise was sold at once and the net proceeds remitted to the shippers. Later, the railroad company discovered that it had collected less than lawful rates established under the Interstate Commerce Act, and thereupon de-

manded the balance alleged to be due by reason of such undercharges. Maintaining it had accepted the shipments upon the understanding that the charges were as reported, and had not agreed to pay more, York and Whitney Company refused the demand." (*Ibid.*, 407.)

"Commission merchants," the court said, "often receive from strangers shipments of perishable articles for sale at market prices. Under a trade custom such things are promptly disposed of and the net proceeds remitted to the consignors. Successful conduct of the business requires prompt settlements. The court below held that whether York and Whitney Company impliedly agreed to pay the rates imposed by law was a question of fact to be determined upon consideration of all the circumstances. It accordingly approved a judgment, entered upon a verdict, favorable to that company as to charges upon one carload * * *, and in behalf of the railroad for those claims on account of eight carloads * * *." (*Ibid.*, 407–408.)

The court held:

> We think the doctrine announced in *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink,* 250 U. S. 577 (November 10, 1919), is controlling, and that the liability of York and Whitney Company was a question of law. The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to

> charge. The consignee could not escape the liability imposed by law through any contract with the carrier. (*Ibid.*, 408.)

The party from whom the carrier has collected the transportation charges has the reciprocal right to obtain refund from the carrier for any overcharge. The same theory of law which makes the party paying the freight charges liable for undercharges also vests in him the right to obtain refund of overcharges.

Mr. Justice Holmes, in the *Darnell-Taenzer case,* said, *the plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.* Here the carriers unlawfully collected the money from the petitioners and under the theory of the law they should pay it back to them. In the *Railway Mail Pay case, United States* v. *N. Y. Cent.,* 279 U. S. 73, 79, the Court, again speaking through Mr. Justice Holmes, said:

> If the claim of the railroads is just they should be paid from the moment the application is filed. In the often-quoted words of Chief Justice Shaw, "If a pie-powder court could be called on the instant and on the spot the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other." *Parks* v. *Boston,* 15 Pick. 198, 208.

So here, if a court could have been called at the exact time and place when the petitioners paid the

sums unlawfully collected from them, the true rule of justice would have been to pay the overcharge back to them instantly.

Under the above authorities it would seem that petitioners were entitled to recover in their own right. But it must be remembered that while the Commission's order directed payment of the reparation to the petitioners, it was not intended either by them or the Commission that they would or should keep the money. The Commission's finding, as made in its report (100 I. C. C. 270; R. 151–152), was that petitioners were "entitled to reparation, as factors and agents for the shippers."

The facts set out in the Commission's report indicate a continuing relationship of agency as between the petitioners and their customers, not a mere temporary agency which ends with the remitting of the proceeds from the sale of a particular consignment. As stated in the report, "the commission merchant at the stockyards not only disposes of the shipper's stock at the market and at such price as he deems best, but is his agent in the payment of freight and related charges, such as feeding, etc., and in the filing of claims for overcharge and for loss and damage to the stock in transit." And the report points out that the carriers "have frequently recognized this relationship by settling loss and damage claims with the commission merchants." (R. 151.)

These commission merchants are members of the Chicago Live Stock Exchange, which maintains an organization familiar with railroad tariffs and practices and experienced in the filing and prosecuting of claims.

The case at bar involved thousands of shipments from widely scattered points of origin. The suit on the reparation order related to 560,005 carload shipments (R. 11), made by 174,000 different shippers. (R. 117.) Unless presented by an organization acting as agent for the shippers, it seems obvious that, as a practical matter, such a claim could not be prosecuted at all. But the interstate commerce law is not so inflexible as to preclude the prosecution of a claim of this character by and through an agency.

The principle under which reparation was awarded to petitioners was not essentially different from that under which reparation was awarded to the complainant in *Missouri Portland Cement Co.* v. *Director General,* 88 I. C. C. 492.

In that proceeding the question before the Commission was whether reparation which the Commission found was due, on 71 carloads of sand, could properly be awarded to the cement company. That company was the vendor and consignor of the shipments, and, as complainant in the Commission proceeding, claimed the reparation. The sales contract specified that the terms of the sale were "f. o. b. complainant's plant," which of course put the obligation to pay the freight charges on the pur-

chasers, who were the consignees. The complainant actually prepaid the transportation charges to the railroad but admitted that by separate invoices it subsequently collected from the consignees the amounts so paid.

The consignees had not filed claim for reparation with the Commission within the two-year period of limitation provided by the Act and therefore their claim was barred. But the cement company had filed claim within the two-year period. The cement company contended that "it paid and, as between it and defendant, bore the charges on these shipments; that it is a proper party to bring this proceeding; that defendant is not entitled to retain the amounts by which the charges exceeded those found by us [the Commission] to have been reasonable; and that, *since the statute of limitations has run against the consignees, refusal now to award reparation to complainant would deprive the consignees of any right or opportunity to effect a recovery.*" (88 I. C. C. 492, 493.) The defendant in reply cited numerous cases in which the Commission had held that the party who actually bore the charges *as such* is the only one entitled to recover.

Conceding that the defendant's statement of its prior practice was accurate, the Commisison said:

> The decision of the Supreme Court in *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, however, has led us to reexamine this question and consider whether or not

we are, as a matter of law, required to confine awards of reparation to parties who actually bore the charges as such. In order to avoid misunderstanding, it should be stated that the facts in that case were not parallel with those by which we are here confronted, and the issue, although similar, was not the same. It is the reasoning which the court employed in reaching its conclusion which is of significance and importance in the present proceeding. (*Ibid.*, 493.)

After reviewing the facts in the *Darnell-Taenzer case,* setting out the pertinent provisions of the Interstate Commerce Act (sections 8 and 16 (1)), and quoting the conclusions of this Court in that case, the Commission (speaking through Mr. Commissioner Eastman) said:

> As aforesaid, this *Darnell-Taenzer case* is not on all fours with the one now before us. There the consignors were the plaintiffs, but the consignees paid the freight charges in the first instance and deducted them from the invoice price for the lumber. Here, also, the consignor is the complainant, but it paid the freight charges in the first instance and subsequently collected them, by separate invoices, from the consignees. But the Supreme Court has said that the "general tendency of the law, in regard to damages at least, *is not to go beyond the first step,*" that "plaintiffs suffered losses to the amount of the verdict *when they paid,*" and that "their claim *accrued at once* in the theory of the law and *it does not inquire into later events.*"

Recognizing that these remarks were directed to an issue which was not identical with the one here presented, although similar, it becomes necessary to consider the essential reasoning of these conclusions and its application to the facts of this case.

Two things are clear. One is that the fact that complainant suffered no ultimate damage is not of controlling importance. In the *Darnell-Taenzer case* plaintiffs transferred the damage to the consumer through the selling price of the lumber. Here complainant transferred it to the consignees through separate invoices, and doubtless it finally reached the consumer. As the Supreme Court states in the *Darnell-Taenzer case*: "Probably in the end the public pays the damages in most cases of compensated torts." The court has made proximate rather than ultimate damage the test, and has said that proximately the losses accrue when the charges are paid. The question, then, is whether in this case complainant "paid" the charges within the meaning of the court. This leads directly to the second point which is clear, and that is that the consignees from whom complainant collected the charges by separate invoices paid the charges and could have maintained an action for recovery, for in the *Darnell-Taenzer case* the charges were paid by the plaintiffs in a similar manner. That is to say, payment was not direct to the railroad but through a third party. Conceding that here the consignees

bore and "paid" the freight charges as such, did the complainant also pay within the meaning of the court?

It appears that, to be entitled to recover, a party must have "privity with the carrier." Undoubtedly there was here privity of contract between complainant and defendant. It was complainant, as consignor, that contracted with defendant for the carriage of the sand, and defendant could have held complainant responsible if the charges had not been paid. * * *

But, as we have indicated above, there may also be privity between the carrier and the consignee, if the latter actually bears the freight charges as such. Consideration of how such privity arises will, we think, throw light upon the question at issue. Where the consignor contracts with the railroad for the movement of the goods but sells the goods f. o. b. point of origin and collects the freight charges from the consignee, it is clear that the consignor is acting as an agent and that the consignee is the undisclosed principal in the transaction. Cases might be cited, but it will hardly be questioned that this is the nature of their relationship. Moreover the right of an agent to sue in his own name, when the principal is undisclosed and makes no objection, is recognized. Quoting from Ruling Case Law, Vol. 21, page 902:

"The right of an agent to sue on a contract which he has entered into in his own name without disclosing his agency, if the

> principal makes no objection, seems to have met with universal recognition. Accordingly, a person who, having in charge, as agent, the goods of another, makes with a common carrier a contract to ship such goods, in which the agency is not disclosed, may maintain action in his own name for a breach of such contract."
>
> In this case not only did the consignees, the undisclosed principals, make no objection to the action brought by complainant, their agent, but the records shows that one of them at least was represented at the hearing and wholly aware of the nature of the proceeding. The conclusion follows that under the circumstances of the case complainant had a right to bring the action. The consignees also had such a right and, if they had exercised it, they would have been substituted for complainant, but they did not exercise it.

The Commission held that reparation might be awarded to complainant, but observed, that doubtless the consignees "will have the right to recover from complainant any reparation that he may be awarded with respect to the 71 carloads, the freight charges upon which they bore as such." (*Ibid.*, 496.)

The Commission added:

> It is not necessary for us to go beyond the "first step," and under the circumstances of this case the first step was taken by complainant when it paid the freight charges.

The Commission's report indicates that it realized the cement company was maintaining the proceeding virtually as the agent of the consignees and that the reparation would ultimately go to the consignees.

If the cement company had failed to pay the reparation over to the consignees, the latter would have had the right to sue the cement company. This principle was recognized in *Jennison Bros. & Co.* v. *Chicago & N. W. Ry. Co. et al.*, 158 N. W. 398. In that case the carrier had refunded an overcharge to the consignee. Thereafter, the consignor, who bore the freight charges as such, sued the consignee and in turn recovered the amount of the overcharge.

In the case at bar, the Commission awarded the reparation to complainants "as factors and agents for the shippers." It is intended that the reparation shall go to the shippers, who actually bore all the transportation charges, and if the petitioners fail to pay over the money, they will be liable to suit. Not only in *Memphis Freight Bureau.* v. *St. L. S. F. R. R. Co.*, 57 I. C. C. 212, but also in other cases, including *Texas Livestock Shippers League* v. *Director General*, 139 I. C. C. 448, the Commission has awarded reparation to factors or agents.

The Commission has awarded such reparation on the ground that the complaints were not only factors or agents of the shippers but were also either

consignors or consignees of the shipments and paid the excessive charges to the carriers, and that it is of no concern to the carriers whether the excess was passed on to a third party pursuant to a contract. As the thought was expressed by the Commission in *American Smelting & R. Co.* v. *Director General*, 144 I. C. C. 570, 572.

> It is of no concern to defendant whether the excess was passed on to a third party pursuant to a contract of sale. The claim arose in contemplation of law the moment the overcharge was paid and the party who paid it was entitled to recovery from that moment.

Under this rule a carrier may safely refund an overcharge to the party from whom he collected it, without being compelled to determine rights and equities as between that party and third parties and without fear of being compelled to pay the same overcharge twice because of mistake of paying it in the first instance to the wrong party.

The District Court seemed to find a contribution to its differentiation of the *Darnell-Taenzer case* in the suggestion that the commission merchants did not pay the freight charges out of their own money but in doing so used the money of the shippers. There appears to be nothing to show that the particular money which the commission men paid over to the Stock Yards Company, in payment of the transportation charges (line-haul rate, switching charge of $2.00 per car, and unloading charge of 25

cents per car) was earmarked as the shipper's money, but it seems that the fact is immaterial. The matter having substance would seem to be that the commission men were *legally liable* for the charge, as so conclusively settled in *N. Y. Cent.* v. *York & Whitney Co.*, 256 U. S. 406, previously cited.* If they had not paid it then, they would have been liable for it later, even though they had remitted all proceeds from the sale of the livestock. In the *York & Whitney case,* the commission men were held liable for the undercharges, despite the fact that the merchandise had been sold at once and the proceeds, less the freight and other charges, had been remitted to the shippers.

The District Court seemed also to be influenced by the decision in *Parsons* v. *Chgo. & N. W. Ry. Co.*, 167 U. S. 447, for it quoted from that decision as follows:

> The only right of recovery given by the I. C. C. Act to the individual is to the "person or persons injured thereby, for the full amount of damages sustained in consequence of any of the violations of the provisions of this act." So, before any party can recover under the act he must show, not merely the wrong of the carrier, but that the wrong has in fact operated to his injury. (R. 72–73.)

But that holding seems to do no more than state what the Act itself provides in sections 8 and 16

* See also *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577; *L. & N. R. R.* v. *Central Iron Co.*, 265 U. S. 59.

and does not seem to suggest a solution of the question here presented, viz, whether the petitioners did suffer damage within the meaning of those sections; and it is to be observed that in the later decision in the *Darnell-Taenzer case* the court held that—

> The plaintiffs suffered losses to the amount of the verdict when they paid. (245 U. S., 1. c. 534.)

And in that case, as here, the plaintiffs "were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge * * *."

The fact, noted in the opinion of the District Court (R. 66) that the petitioners did not "sue as assignees as was done in the case of *Spiller* v. *A., T. & S. F. Ry. Co.*, 253 U. S. 117," is of no significance. In that case the plaintiff Spiller (Secretary of Cattle Raisers' Association) was neither consignor nor consignee of the shipments involved, was not a party to and had no interest whatever in the transportation transactions, and did not pay the unreasonable freight charges or any part of them. Under these circumstances, obviously he could sue for recovery of the reparation only under assignments of the claims. He was in a position fundamentally different from the petitioners here, who were parties to the transportation transactions, who were consignees of the shipments, who paid the charges later found by the Commission to have been unlawfully collected, who were liable

for any undercharges, and who were also factors and agents of the shippers.

The interpretation by the District Court of this Court's decision in the *Darnell-Taenzer case* as simply holding that the court, in a suit on a reparation award, "will not inquire into the commercial effect of the payment of an illegal freight rate" (R. 71), fails to give effect to significant facts in the *Darnell-Taenzer case.*[5] That case arose out of a proceeding before the Commission reported as *Burgess* v. *Transcontinental Freight Bureau,* 13 I. C. C. 668. (June 2, 1908.) There the Commission found that the rate charged on hardwood lumber from points of production in Tennessee and Wisconsin to the Pacific Coast, as advanced in 1904, had been unreasonable and awarded reparation. Complainants, including the Darnell-Taenzer Lumber Co., were the consignors of the lumber and had sold f. o. b. destination. (See 221 Fed. 890, 894.) The freight charges were not prepaid by the complainants but were paid by the consignees upon delivery of the shipments to them at destination. In settling with complainants, the consignees deducted the amount of the freight charges from the complainants' invoices. Therefore, the complainants and not the consignees "bore" the freight charges *as such,* but it is obvious that had the invoice price been fixed high enough to include the

[5] For a full history of that case see 13 I. C. C. 668; 19 I. C. C. 659; 190 Fed. 659 (D. C.); 221 Fed. 890 and 229 Fed. 1022 (6th C. C. A.); 245 U. S. 531.

amount of the freight charges, the consignees would have actually borne the freight charges, not as freight charges but as part of the price of the lumber. It appears that the advance in the freight rate had been included in the amount of the invoice price. Defendants contended that although complainants had paid and borne the freight charges "as such," they had not been injured, inasmuch as they had passed those charges on to the consumer in the price for their lumber. The Commission overruled this contention and awarded reparation, which award was ultimately sustained by this Court. In its report the Commission said:

> This case shows that hardwood lumber has moved to the Pacific coast in larger quantities since the rate was advanced in 1904 than it did previously. The use of hardwood upon the Pacific coast has very much increased. Importations from foreign countries have been greater and shipments from the east have also grown. The amount of lumber sent west from these points of origin is insignificant in comparison with the total amount handled, and the price is but little influenced by the market upon the Pacific coast. The dealer in Wisconsin or at Memphis has charged substantially the same price whether his sales were in the East or for export or for shipment to California, *and this means, of course, that the advance in the freight rate has been added to the price paid by the consumer.* (Italics not in original.) (13 I. C. C. 668, 679.)

Now, it does not appear clearly whether the consignees were the consumers of the lumber or whether they were brokers, jobbers, or dealers, but it does seem clear that the Darnell-Taenzer Co., in selling the lumber to the consignees, fixed a price that included the advance in the freight rate, so that the consignees, whether they were the consumers or not, actually paid the freight charges at least to the extent they were unreasonable. If reparation could not be awarded to the consignors on this account, then the question would arise whether the consignees were entitled to it, and of course it might be urged that the consignees were wholesale or retail dealers and that they were not injured because they, too, had passed the transportation charges along.[6] Addressing itself to this situation the commission said:

> It is impossible to say to what extent these complainants may have been actually damaged by the advance in this rate, *if the word damage is to be interpreted and applied as claimed by the defendants.* (Italics ours.)
>
> Such is not, in our opinion, the proper meaning of this term. These complainants were shippers of hardwood lumber to this destination and they were entitled to a rea-

[6] If, in the case at bar, the consignors of the live stock to the Chicago stockyards had themselves presented claims for reparation, a similar contention would have been just as logical—that the price obtained by the Chicago commission merchants and remitted to the consignors included the extra 25-cent unloading charge and therefore the consignors were not injured.

> sonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. (*Ibid.*, 680.)

This quotation discloses the essential holding of the Commission and indicates where the Commission will stop in the chain of events leading to the actual bearer of the burden. The Commission added:

> If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported. (13 I. C. C. 680.)

Referring to this language Justice Holmes said:

> Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result.

> 13 I. C. C. 680. Probably in the end the public pays the damages in most cases of compensated torts. (245 U. S. 534.)

Thus the essential holding of the Commission and the Court is not merely that the court "will not inquire into the commercial effect of the payment of an illegal freight rate," as suggested by the court below, but that the Commission and the Court need not "go beyond the first step." That "first step" is the payment of the illegal charges; it is then that the party suffers damage, and when his claim accrues in the theory of the law which does not inquire into later events. Subsequent transactions between that party and third parties are, to the carrier, *res inter alios,* with which the carrier is not concerned.

It is stated in the opinion of the District Court:

> If this case were decided in accordance with the earlier holdings of the Commission, it is clear that plaintiffs cannot maintain this suit. If, on the other hand, it is to be decided in accordance with the holding of the Commission in the *Missouri Portland Cement Company case,* and forty or fifty similar holdings since the decision in that case, then the plaintiffs are the proper parties to maintain this suit. (R. 69.)

The present rule of the Commission is disclosed not only by the *Missouri Portland case* but also by two more recent cases, the first of which is *Doughty-McDonald Grocery Co.* v. *A., T. & S. F. Ry. Co.,* 155

I. C. C. 47. There the complainants were the consignees of shipments of salt which they had purchased f. o. b. destination. They paid the freight charges to the delivering carrier but deducted similar amounts from the invoices when remitting to the sellers. The Commission said:

> It appears that to be entitled to recover, a party must have "privity with the carrier." Undoubtedly there was here privity of contract between complainants and defendants. When a carrier delivers freight to a consignee and the consignee accepts delivery and pays transportation charges, thereby extinguishing the carrier's lien, a contract on the part of the consignee to pay undercharges, if any exist, is implied. Consequently, the carrier may recover in a suit for such undercharges against the consignee. *Union Pac. R. Co.* v. *American Smelting & Refining Co.*, 202 Fed. 720; 121 C. C. A. 182. For the same reasons that a consignee can be compelled to pay an undercharge, he should have the reciprocal right to recover any amount that he has been compelled to pay in excess of a just and reasonable charge. In either case, he may have paid the freight in the dual capacity of consignee and agent. The principal, namely the one who bore the charges as such, may have been the consignor or even a stranger to the transportation records. The facts are not disclosed to the carrier when the consignee pays the freight, and the carrier is not in a position,

nor is it required, to ascertain whether the consignee is making the payment for himself or on behalf of another. Consequently, the fact of the agency and the name of the principal may be undisclosed. In the case last cited, the carrier was permitted to recover undercharges from the consignee as such, irrespective of any agreement concerning the charges as such which may have been entered into between the consignee and consignor. Thus, for example, an agent for an undisclosed principal may be personally liable in certain circumstances. Conversely, such an agent should, and does, have the reciprocal right, under certain circumstances, to sue in his own name. Quoting from Ruling Case Law, Vol. 21, page 902:

"The right of an agent to sue on a contract which he has entered into in his own name without disclosing his agency, if the principal makes no objection, seems to have met with universal recognition."

As between the consignee and the carrier, in a suit where the consignor makes no objection to the complaint brought by the consignee, the first step is that taken by the former when, as consignee, it pays the freight charges to the carrier. Where, as here, no objection is made by the consignor, we need not go beyond this first step. *Southern Cotton Oil Co.* v. *Director General,* 89 I. C. C. 154, overruling in principle *Baker Mfg. Co.* v. *C. & N. W. Ry. Co.,* 21 I. C. C. 605. (Ibid., 49–50.)

A similar situation arose in *California Fruit Exchange* v. *American Railway Express Co. et al.*, 155 I. C. C. 105. The question was whether the complainant was entitled to reparation on 22 shipments on which the complainant paid the freight charges to the delivering carrier and later passed them on to the consignors for whose account complainant had handled the shipments. The defendants questioned the complainant's right to reparation on these 22 shipments, contending that as the Interstate Commerce Act provides for reparation only to persons who are damaged, no reparation could be awarded complainant on these shipments upon which it did not bear the freight charges. The defendants admitted "that under the holding in *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, the carrier is liable if complainant has proximately suffered loss, but contend that the mere payment of excessive charges makes only a prima facie case of damage in that there arises a presumption of damage from such payment, and that this presumption may be overcome by definite proof negativing the fact or amount of damage." The fact that complainant had passed the charges on, defendants contended, negatived the fact of damage. In respect of these contentions the Commission said:

> In the case cited, which was a suit brought to recover reparation from the railroads for a rate alleged to be excessive, the court held that where a shipper has paid a rate after-

wards found unreasonable, he may recover as damages the difference without specific proof of pecuniary loss; and that proximately the losses accrued when the charges are paid. Contentions similar to those advanced by defendants here were advanced in *Missouri Portland Cement Co.* v. *Director General,* 88 I. C. C. 492, upon which case complainant here relies, and which was decided by us subsequent to the case above cited. Therein we found that in determining who is entitled to reparation it is not necessary to go beyond the first step; that the first step is taken when the freight charges are paid; and that the fact that whoever paid in the first instance suffered no ultimate damage is not of controlling importance. In the absence here of the consignors who finally bore the charges, the inquiry need not extend further than to determine who paid the charges in the first instance. Under the circumstances of this case, the first step was taken by complainant when it paid the freight charges through its agent, the auction company. Defendants also refer to *L. & N. R. R.* v. *Sloss-Sheffield Co.,* 269 U. S. 217, but the findings herein are not in conflict therewith. (*Ibid.,* 107.)

In the *Sloss-Sheffield case* the consignor and consignee were both parties to the case and both claimed the reparation, in which circumstances it was necessary to determine which of the contesting parties bore the freight charges as such. As be-

tween the consignor and consignee, the one who bore the charges as such prevails. See *Dolese Bros. Co.* v. *A., T. & S. F.*, 89 I. C. C. 110, 122, *Joyce-Watkins Co.* v. *Walsh Tie Co (Mo.)*, 236 S. W. 1105, and *Jennison Bros. & Co.* v. *Chicago & N. W. Ry. Co.*, 158 N. W. See also Note 2 in *Doughty-McDonald Grocery Co.* v. *A., T. & S. F. Ry. Co.*, 155 I. C. C. 47, 50.

Thus the rule followed by the Commission at the present time is this: As between the consignee and the carrier, in a suit where the consignor makes no objection to the complaint brought by the consignee, the first step is that taken by the former when, as consignee, he pays the freight charges to the carrier. Where no objection is made by the consignor, the Commission need not go beyond this first step. Where there is objection by the consignor and he makes a counter claim, as in the *Sloss-Sheffield case*, the one who bore the charges as such prevails.

CONCLUSION

It is submitted that the present rule of the Commission is sound as a matter of law, being fully supported by the decisions of this Court in the *Darnell-Taenzer, Sloss-Sheffield,* and *York & Whitney cases.* Under this rule the Commission awarded reparation to the petitioners in the case at bar. It follows that the petitioners did have the right to maintain an action under section 16 (2) to recover on the Commission's award.

Respectfully submitted.

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MARCH, 1932.

APPENDIX

The Interstate Commerce Act, U. S. Code, Title 49, provides:

> SEC. 1 (6). It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.
>
> SEC. 8. That in case any common carrier subject to the provisions of this Act shall do,

cause to be done, or permit to be done any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 15 (5). Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

SEC. 16 (1). That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled

to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

SEC. 16 (2). If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

The Federal Control Act, c. 25, 40 Stat. 451, 456–457, provides:

SEC. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at com-

mon law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. * * *

That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.

Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being

operated under a unified and coordinated national control and not in competition.

After full hearing the Commission may make such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make.

Transportation Act, 1920, c. 91, 41 Stat. 456, 462, provides:

SEC. 206 (c). Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission within one year, or, if so claimed

in respect of overcharges above the legal tariff charge, within two years and six months, after the termination of Federal control, against the agent designated by the President, under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under the Federal control at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such complaints in the manner provided in the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a).

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

No. 581.—October Term, 1931.

George J. Adams, et al., Petitioners,
vs.
Ogden L. Mills, Director General, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 23, 1932.]

Mr. Justice Brandeis delivered the opinion of the Court.

This action was brought, on December 10, 1928, in the federal court for northern Illinois to enforce an order of the Interstate Commerce Commission for reparations in the sum of $140,001.25, and interest. The plaintiffs, 103 in number,[1] members of the Chicago Live Stock Exchange, are commission merchants engaged in the business of buying and selling livestock at the Union Stock Yards, Chicago. The defendants are the Union Stock Yard and Transit Company, owner of the yards, and the Director General of Railroads, as agent of the President, being the officer against whom suit may be brought, under § 206 of the Transportation Act, 1920, 41 Stat. 461, on causes of action arising out of Federal control. The award was made on account of an extra charge of 25 cents a car for unloading livestock received at the yards from about 174,000 different shippers, during the period of Federal control, December 28, 1917 to February 29, 1920. The Commission held that the charge had been exacted under an unlawful practice; and awarded reparation to the plaintiffs, who as consignees had paid the charge found unlawful. See *Chicago Live Stock Exchange* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 52 I. C. C. 209; 58 I. C. C. 164; 100 I. C. C. 266; 144 I. C. C. 175.

The case was tried in the District Court before a jury upon the evidence introduced before the Commission and additional evi-

[1] This is the figure stated in the opinions of both courts below, and in the briefs of counsel. The names of only 101 plaintiffs appear in the petition in the District Court and in the motion to amend the petition, as set out in the Transcript of Record.

dence introduced by the parties at the trial. At the close of the evidence, each defendant moved, on many grounds, for a directed verdict. The District Judge granted the motions on the ground that the plaintiffs had no such interest in the claims for reparations as would entitle them to maintain an action under § 8 and § 16 (2) of the Interstate Commerce Act. 39 F. (2d) 80. The Circuit Court of Appeals affirmed the judgment; but, not being entirely satisfied that the reason assigned by the District Court was correct, rested its decision on the ground that the exaction of the extra 25-cent charge was a lawful practice. 51 F. (2d) 620. This Court granted a writ of certiorari. 284 U. S. 614.

First. The defendants contend that even if the exaction of the extra 25-cent charge was unlawful, the plaintiffs are not entitled to recover. The argument is that under § 8 of the Interstate Commerce Act the liability of the common carrier is "to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation"; that before any party can recover under the Act he must show not merely the wrong of the carrier, but that the wrong has in fact operated to the plaintiff's injury; that here the award is to the plaintiffs individually, not as agents for the shippers; and that individually they suffered no pecuniary loss, since they paid the charges as commission merchants and reimbursed themselves for these, as for other, charges from the proceeds of the sale of livestock, remitting to their principals only the balance remaining. We think the argument unsound, for the reasons, among others, stated in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, and *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 234-238. See also *Missouri Portland Cement Co.* v. *Director General*, 88 I. C. C. 492, 495, 496; *Doughty-McDonald Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 155 I. C. C. 47, 49; *California Fruit Exchange* v. *American Railway Express Co.*, 155 I. C. C. 105, 107.

The plaintiffs were the consignees of the shipments and entitled to possession of them upon payment of the lawful charges. If the defendants exacted from them an unlawful charge, the exaction was a tort, for which the plaintiffs were entitled, as for other torts, to compensation from the wrongdoer. Acceptance of the shipments would have rendered them personally liable to the carriers if the merchandise had been delivered without payment of the full

amount lawfully due. *New York Central R. Co.* v. *York & Whitney Co.*, 256 U. S. 406, 407, 408. Compare *Union Pac. R. Co.* v. *American Smelting & Refining Co.*, 202 Fed. 720, 723. As they would have been liable for an undercharge, they may recover for an overcharge. In contemplation of law the claim for damages arose at the time the extra charge was paid. See *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 534. Neither the fact of subsequent reimbursement by the plaintiffs from funds of the shippers, nor the disposition which may hereafter be made of the damages recovered, is of any concern to the wrongdoers. This proceeding does not involve a controversy between the consignors and the consignees; and the carriers can not be allowed to import one into it. Compare *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 238. The rights of the shippers in the proceeds of the action will not be affected by our decision. Compare *Jennison Bros. & Co.* v. *Dixon*, 133 Minn. 268. Those rights might have been asserted by intervention in the proceedings before the Commission. They may still be asserted independently in appropriate proceedings later. The plaintiffs have suffered injury within the meaning of § 8 of the Interstate Commerce Act; and the purpose of that section would be defeated if the tortfeasors were permitted to escape reparation by a plea that the ultimate incidence of the injury was not upon those who were compelled in the first instance to pay the unlawful charge.

An additional reason for permitting this action is that the relation between the parties to the shipments in question was that of principal and factor, not simply that of consignor and consignee. The Commission found that, as commission merchants, the plaintiffs were empowered, by well-established usage, to pay the freight and related charges; to file claims for overcharges; and to settle with the carriers therefor. Being factors for the shippers, it was not only their right but their duty to resist illegal exactions. This duty did not, as the District Court suggested, terminate upon remission of the proceeds of the sale of the livestock, less the charges in fact paid. It persists, with the assent of the principals, until the claim for reparation shall have been prosecuted to a successful conclusion. It is urged, on behalf of the defendants, that the order of the Commission ran in favor of the plaintiffs, not as

factors, but as individuals. The contention is contrary to the fact.[2] But the form of the order is without importance. The Commission has recognized the right of a factor to maintain in his own name an action in the interest of his principal. See *Memphis Freight Bureau* v. *St. Louis & San Francisco R. Co.*, 57 I. C. C. 212; *Texas Livestock Shippers Protective League* v. *Director General*, 139 I. C. C. 448. No useful end would be served by requiring the joining of 174,000 shippers in this proceeding; and § 8 of the Interstate Commerce Act is not to be so construed. Compare *Spiller* v. *Atchison, Topeka & Santa Fé Ry. Co.*, 253 U. S. 117, 134, 135.

Second. The defendants challenge the Commission's holding that the extra charge of 25 cents made to the shippers was an unlawful practice. The conclusion rests upon the findings that the Stock Yards are, in effect, terminals of the line-haul carriers; and that the service of unloading the livestock there is a part of transportation. That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so. Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants*

[2]The finding of the Commission in its report of June 2, 1925, was that the parties of record who "paid the charges" on the shipments involved "have been damaged in the amount of such charges and are severally entitled to reparation, as factors and agents for the shippers." 100 I. C. C. 266, 270. The fact that "the charge which was paid by the commission merchant was subsequently charged back and collected from the consignors," the report said, "would not affect the right of the complainant consignees to awards of reparation. There is a direct and well established relation between the complaining members of the exchange and their shippers by which the former are fully authorized to present these claims and seek awards of reparation in their own names as factors and agents for such shippers. . . . The right of factors in their representative capacity to recover reparation in their own names for unlawful and unreasonable charges is settled." *Ibid.*, at 269, 270.

That the subsequent order of the Commission, of December 12, 1927, fixing the amounts due the several complainants, made no reference to their position as factors is without significance. The order expressly incorporated the report; and in the report the Commission had already determined that the complainants, as factors, were entitled to recover in their own names. Nor is the form of the petition in the District Court material. The plaintiffs' right of recovery in this proceeding was defined by the finding and order of the Commission in their favor.

Elevator Co., 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 232 U. S. 199, 221; *Los Angeles Switching Case*, 234 U. S. 294, 310, 311.

Third. There was ample evidence to sustain the findings of the Commission that the unloading of livestock at the stockyards was a part of the transportation provided for in the tariffs of the line-haul carriers.

(1) Throughout the United States, the duty of unloading carload freight rests ordinarily upon the consignee. See *National Lumber Dealers' Association* v. *Atlantic Coast Line R. Co.*, 14 I. C. C. 154, 160. But continuously for fifty years prior to 1917, livestock had been unloaded at Chicago by the Stock Yards Company, without charge therefor to the shipper or consignee.[3] Compare *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 136. For this service the company received 25 cents a car; but not from the shipper. Its charge was paid by the line-haul carriers, whose tariffs read: "Carriers as shown will pay the Union Stock Yards and Transit Company's charges as follows: Unloading (in cents per car) 25."

The history of the practice is this. The Union Stock Yard and Transit Company was organized in 1865 by the railroads then entering Chicago; and until 1894 its shares were largely held by them. The company constructed stockyards and tracks connecting with those of the line-haul carriers. After 1897 the company's railroad property was operated under lease by the Chicago Junc-

[3] Transportation Act, 1920, § 418, 41 Stat. 486, enacted after the period here in question, provided that thereafter, with certain exceptions: "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner."

tion Railway Company, which received from the line-haul carriers compensation for the use of its tracks. The line-haul carriers, using their own locomotives and crews, brought all inbound carload shipments of livestock to the unloading chutes of the Stock Yards Company; and collected from the shippers a terminal or switching charge of $2 per car, in addition to the line-haul rate.[4]

From the time when the cars were placed at the chutes, the course of business was substantially as follows: Employees of the Stock Yards Company unloaded the livestock into pens located upon the company's property and leased by it to the commission merchants who handled the stock for the shippers and who were invariably the consignees of the shipments. The Yards Company notified the commissionmen of the arrival of the shipment, prepared the official record of the receipt of the livestock, the contents of the car, and the condition of the animals—the record used by the line-haul carriers. After securing from the Western Weighing Association Bureau (a bureau of the line-haul carriers) data concerning the actual weight of the livestock, the company made a corrected record of the freight charges due from the commissionmen. These charges it collected for the line-haul carriers; and, in consideration of the prompt release of the livestock without surrender of the bill of lading and without payment of the charges, it guaranteed them. The practice was for the company to make collection from the consignees of all charges twice a week; and once a week to pay the whole amount thus collected to the railroads. Once a month the railroads paid the Yards Company its charges for unloading.

(2) Prior to the decision in *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286 (December 9, 1912), the unloading charges of the Yards Company had not been contained in any tariff filed by it with the Commission. After that decision the company filed with the Commission its Tariff No. 1, effective May 30, 1913, stating its charge to be 25 cents a car. That tariff remained in effect, without any attempt to change it, or the practice under it, until the Yards Company filed a so-called Tariff No. 2,

[4] The imposition of the $2 charge was the subject of much litigation before the Commission and the courts. Interstate Commerce Commission *v.* Chicago, Burlington & Quincy R. R. Co., 186 U. S. 320; Interstate Commerce Commission *v.* Stickney, 215 U. S. 98. Compare Chicago Live Stock Exchange *v.* Chicago Great Western Ry. Co., 10 I. C. C. 428.

to become effective May 21, 1917, which recited: "The charge made by this company for the service (as a carrier's agent) of . . . unloading livestock at the Union Stock Yards at Chicago, Illinois, is as follows: For unloading 50 cents (per car of any capacity)."[5]

The line-haul railroads did not join in the Yards Company's Tariff No. 2, or authorize it. They did not file new tariffs embodying the extra 25-cent charge. And they refused to absorb the extra charge. Upon such refusal, the Yards Company, in order to compel payment by the carriers, adopted the practice of withholding the sum demanded from the freight charges collected for them. In retaliation, the carriers threatened to collect those charges for themselves. The result of this controversy was an arrangement arrived at between the railroads and the Yards Company, whereby the former added the disputed charge to their freight bills, and the latter collected it from the shippers, despite their protest. These bills did not indicate that the extra charge imposed was one of the Yards Company to the shipper.[6] As theretofore, the whole amount collected was turned over by the company to the railroads.

Meanwhile, the Yards Company, contending that because of certain changes made in its relation with the Chicago Junction Railway it was no longer a common carrier of interstate commerce, filed with the Commission a supplement to its tariffs, to be effective September 1, 1917, in which it undertook to cancel all its tariffs. The proposed supplement was suspended by the Commission under § 1 (7) of the Interstate Commerce Act; and, before any decision had been reached in the suspension proceedings, the Chicago Live Stock Exchange filed its complaint against the Yards Company and the line-haul railroads challenging the extra 25-cent charge. The proceedings were consolidated. Soon there-

[5]The tariff originally filed by the Stock Yards Company, May 30, 1913, did not contain the words in parenthesis, "as a carrier's agent."

[6]The freight bills were made out upon forms, headed "United States Railroad Administration—Director General of Railroads," together with the name of the carrier; and, so far as appears, showed only the total charges, entered in a column marked "Freight Charges." The way-bills, however, contained itemized charges, as follows: "Total charges on Original Way-bill;" "Feed Charges at . . . "; "Yardage at . . . "; and "Inspection at . . . ." In the last column was entered the terminal charge of $2; in the column for "yardage" was the entry, "Unabsorbed Unloading—25c."

after, the railroads passed under Federal control; and the Director General, who continued the arrangement instituted by the carriers with the Yards Company, became a party to the proceedings before the Commission. That arrangement continued to the end of the period of Federal control, as the order of the Commission declaring the practice unlawful was not entered until July 15, 1920, 58 I. C. C. 164.

(3) Thus, by the unbroken usage of fifty years the payment by shippers of livestock of the line-haul rate to Chicago, plus the terminal charge of $2, had covered all services performed in connection with the shipment up to and including the placing of the stock in the pens of the commissionmen. The Commission so found; and this Court has heretofore so recognized. See *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy R. Co.*, 186 U. S. 320, 327, 329, 336; *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 108. Beyond dispute, the Yards Company, in the services which it performed, regarded itself as the carriers' agent. This appears not only from the previous course of business, but from the terms of its second tariff, from its initial conduct with respect to collection of the additional charge and from its attempt to cancel all its tariffs. The carriers for years had paid the Yards Company all its charges; and there was testimony that both the $2 terminal charge and the line-haul rates were predicated upon such payment. The company's charges, moreover, which constituted its sole compensation, covered services, other than the mere unloading of cars,—services which were obviously performed for the benefit of the carriers rather than the shippers.

Whether, upon the company's demand for increased compensation, the carriers, under their tariffs, could lawfully join with it in shifting the burden of such increase to the shippers depended upon the question of fact whether the unloading of cars was the proper duty of the railroads or of the consignees. The basis of the usual practice requiring the consignee to unload carload freight is that the consignee can do it more effectively than the carrier. See *National Lumber Dealers' Association* v. *Atlantic Coast Line R. Co.*, 14 I. C. C. 154, 160. The Commission found that, in view of the congested conditions in the Chicago stockyards and the great volume of traffic, it would have been physically impracticable, if not impossible, for the consignees themselves to

unload their own shipments. Certainly the Commission could reasonably determine upon this evidence that the conditions with respect to livestock in Chicago justified a different rule there from that obtaining in other places; that, in fact, a different practice had prevailed; and that no reason existed for permitting a departure from that practice.

Fourth. It is urged by the defendants that the Stock Yards Company had been found by this Court to be a common carrier, *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; that this finding was adhered to by the Commission in the present proceeding despite the claim of a change in conditions; that as a common carrier the company was compelled to publish its tariffs; that the tariff, as published, has not been found by the Commission to be unreasonable; and that its collection, therefore, was mandatory and hence could not be unlawful. But the tariff, as published, authorized only the collection of the charge as a carrier's agent. The question at issue is not the reasonableness of the charge, but the lawfulness of the practice, jointly pursued by the railroads and the company, of collecting the extra charge from the shipper. The reasonableness of the charge itself, and the complementary question whether the railroads should be required to absorb it, were in no way involved before the Commission; and that tribunal properly made no finding with respect thereto. Nor was the issue affected in any manner by the status of the Yards Company as a common carrier. It did not follow from such status that it could not act as an agent of the line-haul carriers, nor that it was entitled to collect a part of its charges from the shippers. Compare *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366; *Union Stockyards Co.* v. *United States*, 169 Fed. 404, 406.

Fifth. Certain additional grounds of defense, not considered by either of the courts below, are pressed here. The Director General urges that the terms of Congressional consent do not permit him to be proceeded against before the Commission for a tort, compare *Missouri Pacific R. Co.* v. *Ault*, 256 U. S. 554, 559, but only for damage resulting from the "collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations or practices . . . which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial." Transportation Act, 1920, 41 Stat. 462, c. 91, § 206 (c). The contention that the

acts of the Director General, found by the Commission, did not in any view constitute an "unjust or unreasonable practice" within the meaning of this provision, is manifestly untenable. The contention is really directed against the Commission's finding that the Director General participated in the practice. Ample support for this finding is furnished by the conceded fact that the extra charge was added by the railroads to their freight bills, and by the testimony that these bills were first collected by the Yards Company, that the entire proceeds were paid over to the railroads, and that the railroads subsequently compensated the company.

Sixth. The Stock Yards Company urges several independent grounds of defense, not joined in by the Director General. It is argued that the order sued on includes awards of reparation against the company on purely intrastate shipments moving during the period of Federal control; that the jurisdiction conferred on the Commission by Transportation Act, 1920, 41 Stat. 462, c. 91, § 206 (c), to grant reparation on claims arising out of intrastate traffic during Federal control does not permit the inclusion of such elements in an award against the Yards Company, which was never taken over by the Government; and that, the petitioners not having established by proper proof to what extent the award made was valid, the order must be declared invalid as a whole. The record, however, does not show that this objection was urged either before the Commission or in the District Court; and it accordingly will not be entertained here.

The remaining contentions of the Yards Company relate to the sufficiency of the complaint in Docket No. 9977, to the competency of the evidence upon which the amount of the reparation awarded to each complainant was determined; and to a claim that the Commission acted upon evidence not in the record. We have considered these objections; and find them to be without merit.

The judgment of the Circuit Court of Appeals is reversed; and the case is remanded to the District Court with direction to enter judgment for the amount of reparation awarded, with interest, and for reasonable attorney's fees to be fixed by it.

Reversed.

Mr. Justice BUTLER is of opinion that plaintiffs are not "persons injured" within the intention of § 8 and that the assailed "practice", if it is such within the meaning of the Act, was not unreasonable and that therefore the judgment should be affirmed.